Gen. No. 10028 Agenda No. 5

In the Appellate Court of the
State of Illinois
Second District

May Term, A.D. 1945

32 I.A. 102

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| Earle B. Tilton, Plaintiff-Appellant, v. Robert R. Ludwig, Defendant-Appellee. | Appeal from the Circuit Court of DuPage County. |

Dove, P. J.

Appellant filed an amended complaint of ten paragraphs in the circuit court of DuPage County, charging appellee with slander. The first four paragraphs, after alleging that appellant is a licensed attorney at law in this State, and has been for many years last past engaged in executive capacities with various firms and corporations, and that he was of good character and reputation, continuously earning large gains and profits, charged in substance that appellee, in the presence of certain named persons, or one of them, maliciously spoke and uttered of and concerning appellant false, malicious, and defamatory matter stating that appellant had fraudulently attempted to obtain from appellee a power of attorney running to appellant so that he could take control of all the property and affairs of appellee, meaning, and intending to mean, and understood to be meant by all persons hearing him, that appellant had fraudulently, corruptly, and dishonestly attempted to procure by fraud, deceit and trickery all of the property of appellee for his own use and benefit, and by fraud, deceit, and trickery to deprive appellee of his property and to cheat and deprive appellee of all of his property. The last six

paragraphs of the amended complaint allege the speaking of words by appellee in the presence of certain named persons, or one of them, stating that appellant was living in an open state of adultery with one June Doe.

Appellee answered the last six paragraphs of the amended complaint, denying uttering the words therein alleged to have been spoken by him, and filed a motion to strike the first four paragraphs of the amended complaint, which motion was sustained. Subsequently, appellant filed an amendment to the amended complaint, substituting four new paragraphs for the four stricken paragraphs, and this amendment to the amended complaint was also stricken on appellee's motion. Appellant then filed a second amendment to the amended complaint in place of the stricken paragraphs, and on appellee's motion this second amendment to the amended complaint was also stricken. The grounds of this last motion to strike are that there was nothing stated in the second amendment not contained in the pleadings theretofore stricken, and nothing which showed that appellant was actually engaged in the general practice of law, or that the alleged spoken words were spoken of appellant in connection with his business. The cause is here by an appeal from the order striking the second amendment to the amended compladnt.

At the outset we are confronted with the question of whether the order appealed from is a final appealable order. No judgment in favor of appellee was entered, and nothing was done except to sustain the motion to strike the second amendment to the amended complaint. The right to appeal is strictly statutory. (Durkin v. Hey, 376 Ill. 292). The Statute, (Ill. Rev. Stat. 1943, chap. 110, par. 201), provides for appeals only from final orders, judgments or decrees, Orders

other than final orders, judgments and decrees, are not appealable. (People v. Mitchell, 325 Ill. 472). An order, judgment or decree is final for the purpose of appeal only when it terminates the litigation between the parties on the merits so that when it is affirmed the court below has only to proceed with its execution. (Walters v. Mercantile National Bank of Chicago, 380 Ill. 477, 485: Almon v. American Carloading Corporation, 380 Ill. 524, 530, 531: People v. Fisher, 335 Ill. 406, 415: Emerson's Estate v. Cook, 320 Ill. App. 337). Where a motion to dismiss or strike a complaint is sustained, in order for such ruling to become final and appealable, a judgment should be entered for the defendant, to the effect that the plaintiff take nothing by virtue of such action, and that the defendant go hence without delay, or words of similar import and meaning. (Board of Education v. Board of Education, 301 Ill. App. 228). An order sustaining a motion to strike a complaint, or an amended complaint, standing alone, is not a final appealable order. (Doner v. Phoenix Joint Stock Land Bank of Kansas City, 381 Ill. 106, 108; Barber v. Wood, 318 Ill. 415; Trebbin v. Thoeresz, 316 Ill. 30; Moroni v. Albers, 301 Ill. App. 633).

Where an appeal is taken prematurely before entry of final judgment a court of review must, on its own motion, dismiss the appeal even though no question of jurisdiction is raised by the parties, since, in the absence of a final appealable order, the parties cannot confer jurisdiction upon the court by consent. (Reynolds v. Wangelin, 314 Ill. App. 12). The order in this case is not a final appealable order, and the appeal is dismissed.

Appeal dismissed.

In the Appellate Court of Illinois
Second District
May Term, A. D. 1945

Gen. No. 10033 Agenda 9

GEORGE EDWARDS
Appellant
vs

IRVIN E. WERNICK
Appellee

Appeal from Circuit Court
Winnebago County



BRISTOW - J.

On August 9, 1943, the plaintiff George Edwards went to the laundry establishment of the defendant, Irvin E. Wernick, to register a complaint about the manner in which some shirts had been laundered. His specific grievance was that they had been torn and frazzled, and the plaintiff was seeking some new shirts to replace those alledgedly damaged in the laundering process. The defendant and his partner, John Strom, inspected the garments on that occasion, and pointed out that the shirts had many different marks on them indicating the numerous times that they had paid a visit to the various laundries. Wernick, the defendant, then pressed his finger against a portion of one of the shirts to show its worn condition, whereupon his finger went through the cloth. This seemed to annoy the plaintiff and made him very angry. The differences and arguments between them precipitated a fight which resulted in the plaintiff being injured about the face and mouth.

The plaintiff brought suit in the Winnebago County Circuit Court, claiming five thousand dollars in damages and charging in two counts that the defendant unlawfully assaulted him. The defendant filed an answer denying the charges. Upon a trial before a jury, a verdict was returned finding the defendant not guilty. After a motion for new trial was over ruled, the court entered a judgment on the verdict in bar of action and for costs. This appeal followed.

A reading of the record discloses that the plaintiff recites that the defendant struck him in the face with his fists at the time of the altercation in question. The defendant on the other hand, testified that the plaintiff had with him a cane and that when he

became angry he raised it and when in the act of striking him, the defendant grabbed it on its downward course. In so doing, one end of the cane struck the plaintiff in the face, thus causing him the injuries complained of. The defendant is sustained in his version of what happened by two other witnesses, one his partner and the other his bookkeeper. A careful reading of the testimony convinces us that the defendants recital of events is reasonable, and that the jury were fully warranted in reaching the conclusion that prompted their verdict of not guilty. We are not disposed to disturb the same.

The plaintiff in his brief makes many claims of errors committed by the trial court which should occasion a reversal of the judgment entered. Most of these claims are trivial and without merit. However, there is one instruction given on behalf of the defendant which warrants some consideration. It reads as follows: "The Court further instructs you that if you believe from the evidence that at the time mentioned in the complaint and just before the time of the commission of the alleged grievances therein stated that the plaintiff made an assault or struck at the defendant without provocation and with intent to do him bodily harm and would have beaten and greatly bruised him if he had not immediately defended himself, then you are instructed that the defendant had a right to defend himself in a lawful manner, using no more force than appeared to the defendant, at that time reasonably necessary to protect himself." The plaintiff admits that the above is a correct statement of the law but contends that it has no application in this case, since the affirmative defense of "self defense" was not set up in the answer. That "self defense" is an affirmative defense and that facts constituting the same should be affirmatively pleaded is little questioned. Hahn vs Ritter, 12 Ill. 80; Illinois Steel Co. vs Novak, 184 Ill. 501; Olsen vs Upsahl, 69 Ill. 273. However,

when we consider the nature of the defendant's explanation of what occurred, it is apparent that the defendant did not seek to invoke the defense of "self defense". He did n t intentionally strike the plaintiff a blow in the face, but only inadvertently did so while defending himself against an attack by the plaintiff with his cane. Certainly the defendant had a right to ward off a threatened blow from the plaintiff's cane, and generally to defend himself against bodily harm in whatever manner seemed reasonably necessary. In view of the facts in this case, we believe it was not improper for the court to have given the above instruction.

The jury's verdict is not against the manifest weight of the evidence and since there appears no errors that would justify a reversal, the judgment entered by the trial court should not be disturbed and is hereby affirmed.

JUDGMENT AFFIRMED

Abstract

General No. 9473. Agenda No. 5.

IN THE APPELLATE COURT

OF ILLINOIS 32 I.A. 203

THIRD DISTRICT

OCTOBER TERM, A. D. 1945.

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| BENJAMIN W. WISE and MABRE WISE KRUEGER, Plaintiffs-Appellees, | APPEAL FROM THE CIRCUIT COURT OF VERMILION COUNTY. |
| -vs- | |
| POTOMAC NATIONAL BANK OF POTOMAC, ILLINOIS, A Corporation, and ALBERT RICE, as Liquidating Agent for the Potomac National Bank of Potomac, Illinois, a Corporation, Defendants-Appellants. | ~~HONORABLE GEORGE W. BRISTOW, Judge Presiding.~~ |

HAYES, P. J.:

Benjamin D. Wise died in 1918 leaving a last Will and Testament which provided in paragraph five as follows: "I give and devise to my son Elmer J. Wise and the heirs of his body the following described real estate," describing a farm in Vermilion County, Illinois. Elmer J. Wise survived his father and had three children, --Benjamin W. Wise, Mabre D. Wise and Doris V. Wise. In 1929 the Potomac National Bank obtained a judgment against Elmer J. Wise and wife, on which an execution was issued. Upon a Sheriff's sale the Bank purchased the farm. After expiration of the redemption period the Bank received a Sheriff's deed and went into possession of the property. This deed was never recorded and was lost by the Bank. In 1942 a decree was

entered by the Circuit Court of Vermilion County in a suit brought by the Bank ordering a Master's Deed issued to the Bank.

This action was brought in the Circuit Court of Vermilion County against the Potomac National Bank which was then in the process of liquidation and Albert Rice, its liquidating agent, by Benjamin W. Wise and Mabre D. Wise as heirs of the body of Elmer J. Wise, and as grantees of Doris V. Wise who had conveyed any interest in the premises she might have to her brother. In their complaint plaintiffs prayed damages for waste alleged to have been comitted by the Bank, forfeiture of the Bank's title, or in the alternative a permanent injunction enjoining for the waste. A decree was entered by the Court awarding plaintiffs three thousand dollars as damages for waste committed by the Bank and enjoined the Bank from comitting future waste. Both plaintiffs and defendants have appealed to this court.

Plaintiffs in their complaint allege that the devise in paragraph five of the Will of Benjamin D. Wise constituted a common law fee tail which by virtue of the Statutes of the State of Illinois in force at the time of the death of said Benjamin D. Wise and now in force, created a life estate in Elmer J. Wise with a vested remainder in fee simple in the heirs of his body,-- Benjamin W., Mabre D. and Doris V. Wise, subject to being opened up to admit any future heirs of the body born to Elmer J. Wise.

Defendants in their motion to strike and dismiss the complaint alleged that plaintiffs were not proper or

necessary parties because they had no interest or title to the real estate in question. In their answer, defendants made a similar allegation and claimed further that all interest in the premises was vested in them.

The decree of the Circuit Court contains a finding similar to the allegation in the complaint described above. In paragraph 17 of the assignment of errors in their proof, defendants contend that the circuit court erred in making this finding and this assignment is supported by citations in their brief, and by argument. Plaintiffs in their answer supply citations and argument to maintain their contrary position.

While there are numerous issues raised on the appeal and cross appeal in this case, it can be seen that before a decision on any of them is appropriate, a determination of plaintiffs' interest in the real estate in question and of their right to maintain this suit must be made. This issue we are not authorized to review. Where determination of a freehold is directly involved, an appeal must be taken from the Trial Court directly to the Supreme Court. Ill. Rev. Stats, 1943, Ch. 110, Sec. 199; Brand v. Union Elevated R.R.Co., 277 Ill. 356; Vrooman v. Hawbaker, 322 Ill. App. 77; Pursuant to chapter 110, section 210, 1943 Ill. Revised Statutes, this cause is transferred to the Supreme Court of Illinois.

CAUSE TRANSFERRED.

Abstract

General N~~umber~~o 9478. Agenda N~~umber~~o 8.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
OCTOBER TERM, A. D. 1945.



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| K. LAYNE, Plaintiff-Appellant, | APPEAL FROM THE CIRCUIT COURT OF CHRISTIAN COUNTY. |
| -vs- | |
| LOREN B. COLEGROVE, Defendant-Appellee. | ~~HONORABLE JOSIAH C. BILLINGTON, Judge Presiding.~~ |

HAYES, P. J.:

On August 11, 1943 Kimber Layne purchased certain assets of the John B. Colegrove & Co. State Bank of Taylorville, Illinois at a receiver's sale. Among these assets was a judgment against Loren B. Colegrove and wife for $2,540.69. Layne brought suit to revive a judgment in the Circuit Court of Christian County. A trial was had before the Court, without a jury, and judgment for Layne was entered in the sum of $49.50 and costs.

Colegrove, as a defense to this suit, contends that prior to the receiver's sale, Layne agreed to sell for one cent on the dollar, all debts of Colegrove included among the assets of the Bank that were to be sold. On the witness stand he testified that Layne called at his home before the sale and asked him if he was interested in bidding on any of the assets enumerated in the sale bill. Colegrove replied that he wished to bid on certain of his

obligations, whereupon Layne agreed to settle these debts if Colegrove would refrain from bidding at the sale. On the day of the sale, during a conversation between Colegrove and an associate of Layne, the latter assented to the settlement of certain listed items of indebtedness of Colegrove for about one cent on the dollar. Layne, who was called as a witness for defendant, testified to substantially the same set of facts up to this point.

The only issue in this case is whether Layne and Colegrove agreed to settle the judgment sought to be revived here on the same terms as Colegrove's other obligations. This particular judgment was not listed on the sale bill, except as a part of a group of miscellaneous and undescribed choses in action. Layne testified that he did not know that he had acquired this judgment until long after the sale, and that he had agreed with Colegrove to settle only those enumerated obligations which they had described. Colegrove, on the other hand, claims that although only those items enumerated on the sale bill were specifically discussed by he and Layne, nevertheless he was aware of the existence of the judgment in question here, and that Layne and he agreed that all of his obligations would be settled on the same basis. Mrs. Colegrove, who also testified, stated that she overheard a part of the conversation between Layne and her husband at their home and that she understood that all her husband's debts would be settled for a nominal sum.

The Circuit Court heard the witnesses in this case and was in a much better position than this court to judge their credibility. It is true that Colegrove had the burden of proving his affirmative defense, and

that the testimony is conflicting in essential particulars, nevertheless the Circuit Court found that Colegrove had sustained his burden of proof. We believe there is substantial evidence supporting Colegrove's theory of the case. While this court might weigh the evidence differently, nevertheless, since the trial court's judgment is supported by substantial evidence, we are not warranted in disturbing it. Brancecum v. Simmons, 116 Ill. App. 98.

The judgment of the Circuit Court of Christian County is therefor affirmed.

JUDGMENT AFFIRMED.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1945

Gen.No.0479 Agenda No. 9

327 I.A. 20

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| Arvil Russell and Robert Russell, by Othal Russell, father and next friend, Plaintiffs-Appellees, | ) | Appeal from |
| -vs- | ) | Circuit Court, |
| Consolidated Forwarding Corporation, Inc., a Corporation, Defendant-Appellant. | ) | Sangamon County. |

Dady, J.

In an automobile-truck collision case, the defendant appeals from a judgment in favor of each of two plaintiffs, based on the verdict of a jury.

On November 5, 1945, about 10:00 P. M., plaintiff Arvil Russell was driving his automobile northerly on State Route 66 toward the City of Springfield. The other plaintiff Robert Russell, who was his nephew, was riding therein as a passenger or guest. The weather was clear. The road was straight and paved with concrete. The easterly half of the road was primarily for north bound traffic.

For some distance north and south of the place of the accident, places in the pavement had been recently repaired so that the easterly half was not entirely open for traffic. At each place where such repairs had been made there was a barricade, called a wooden truss or horse, which blocked traffic on the easterly half of the pavement at such point. At each of such barricades there was located from two to four pot flares, which were lighted and burning. The distance between the barricades varied, some being quite close together, and some a considerable

distance apart, from 50 feet to a quarter mile apart. The next barricade south of the place of the accident was about 500 feet distant. Between the barricades cars were permitted to travel on the easterly half of the road. The pavement was so obstructed for a distance of at least 1-1/2 miles south of the place of the accident.

At the time of the accident defendant's truck was standing still a few feet south of one of such barricades, waiting for a south bound automobile to pass on the westerly half of the pavement.

The truck was of a tractor-trailer type, about 35 feet in length and about 8 feet in width at the rear. Its gross weight was about 35000 pounds. The gross weight of the Russell automobile was about 3000 pounds.

While the truck was so standing, Arvil Russell, traveling on the easterly half of the pavement, drove his automobile into the rear of the truck in such a manner that the front of the automobile, up to within about eight inches of the windshield, ran into and became wedged under the rear of the truck.

Each plaintiff was severely injured.

The judgment for Arvil Russell was in the amount of $10,000, and the judgment for Robert Russell was in the amount of $8,000.

The specific negligence charged was that the defendant failed to display on the rear of the truck three red lights approximately six inches apart, plainly visible at a distance of 500 feet, in violation of Par. 201 of Ch. 95-1/2 of the Revised Statutes, and that the defendant failed to display any light on the rear of the truck, and failed to give any warning of its presence on the highway, and stopped the truck in such a position that it obstructed visibility of the flares and barricade.

Both plaintiffs testified that at the time of the collision and prior thereto they were going about 30 to 35 miles per hour, and each testified that he did not see the truck until the collision.

Arvil testified that while he was driving on the easterly side of the road a south bound car, approaching from the north, had on its bright lights until such car was about 200 feet distant; that when about 200 feet distant the driver of the south bound car put on his dim lights, and that he, Arvil Russell, was about even with the south bound car at the time his car struck the truck; that prior to the collision he saw no red lights of any kind on the right side of the road, and saw no lights on the truck and did not see the barricade, that he immediately became unconscious, and when he again became conscious shortly afterwards, and as they were putting him into the ambulance, he was behind the truck and saw the truck, and did not see any lights on its rear and that there were no such lights.

Robert Russell testified that as they approached the place of the collision the approaching south bound car had on its bright lights, that he saw no north bound vehicle ahead of them, that the lights of the approaching south bound car blinded him to a certain extent, that just about the time they were passing the south bound car the collision took place, that he did not become unconscious, that he got out of his car and walked up to the truck, that the front end of the truck was about two feet south of the barricade, and that there were then no lights on the front, side or rear of the truck.

Mowry, the driver of the truck, testified that as he drove his truck northerly toward the barricade in question there was an automobile in front of and between the truck and barricade, that such automobile

was also going north and stopped about 6 to 10 feet south of the barricade, that he, Mowry, then stopped his truck for about 30 seconds about 6 feet south of such automobile, that such automobile then started up, but had not gone entirely around the barricade when the automobile of the plaintiffs ran into the rear of the truck at a time when the truck was so standing still, and pushed the truck about 15 feet forward. He further testified that before the accident bright lights were burning on the front, rear and sides of the truck, that after the accident, with the exception only of the lights at the rear base of the truck, which had been destroyed by the collision, all lights on the truck were burning, including bright lights at the top and close to each upper corner of the rear of the truck.

Two other truck drivers, one of them an employee of the defendant, were driving trucks northerly a short distance behind the defendant's truck. Both such drivers testified that they had followed the defendant's truck for several miles immediately southerly of the point of the accident, and that a short time before the accident they saw all lights burning on the rear of the truck. Each testified that shortly after the accident all lights on the rear of the truck were burning, except at the base thereof.

Another witness testified that he had been driving northerly and had passed the truck about a half mile south of the place of the accident; that at that time the rear lights on the truck were burning; that as he approached the barricade in question he stopped his automobile immediately south of the barricade to let south bound traffic pass on the left, and in doing so stopped his car behind another car which was between him and the barricade; that when the first string of cars proceeding southerly had passed the barricade,

the car in front of his went around the barricade, but he still sat still until after the second string of cars passed and he then started up and was driving around the barricade when he heard the noise of the collision; that immediately after the collision he got out of his car and went back to the place of the accident and the truck was then about 100 feet south of the barricade.

The first contention of the defendant-appellant is that the evidence shows that the plaintiffs were guilty of contributory negligence as a matter of law and therefore cannot recover.

Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts do not establish due care and caution on the part of the person charged therewith. (Thomas v. Buchanan, 357 Ill. 270, 277.) A court can only determine as a matter of law that the evidence does not tend to show due care on the part of a plaintiff when no other conclusion can be reasonably drawn from the uncontradicted facts and from the evidence that is favorable to the plaintiff. (Pienta v. Chicago City Ry. Co., 284 Ill. 246, 252).

It is our opinion that we cannot properly say that the evidence shows that the plaintiffs were guilty of contributory negligence as a matter of law.

The next contention of the appellant is that the verdict was against the manifest weight of the evidence.

There was nothing inherently improbable in the testimony of any witness. If the jury believed the testimony favorable to the plaintiffs, and they evidently did so believe, then the jury was in our opinion justified in finding in effect that at the time of the accident there

were then no lights on the rear of the truck and that the truck was then standing in a position to conceal the barricade from the view of the plaintiffs.

Where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize a verdict, even though it may be supported by a lesser number of witnesses, a court of review will not set it aside. (Carney v. Sheedy, 295 Ill. 78, 83.)

Appellant complains of the giving and refusing of instructions.

Plaintiff Arvil Russell's instruction number three told the jury that if they believed that said plaintiff "sustained injuries on account of negligence of defendant as claimed, then the measure of recovery is such damages as will compensate plaintiff for such injuries. The elements which may enter into such damages are the following: * * * (2) Such sums as will compensate plaintiff for damages to his property, (Italics ours) if a preponderance of the evidence shows that plaintiff's property was damaged. * * * The * * * second of these elements are subjects of direct proof and are to be determined by you from a proof and * * * from a preponderance of the evidence." In the complaint Arvil Russell alleged that by reason of the collision his automobile and various parts thereof were broken and damaged in the amount of $1200. By this instruction the jury in effect were told that they might allow Arvil Russell damages for injuries to such automobile. While it might be inferred from the record that the automobile was greatly damaged through the collision, the record contains no evidence whatever as to the amount of such damages or cost of repair, or of the value of the automobile at any time before or after the collision. In this state of the record, it is our opinion that the giving of such instruction was

reversible error. (Wicks v. Cuneo-Henneberry Co., 319 Ill. 344; Schultz v. Gilbert, 300 Ill. App. 417).

Plaintiffs given instruction number five told the jury that if they believed that the plaintiffs were in the exercise of due care for their own safety * * * "at the time and place as alleged in the complaint," * * * "then you may find the issues in favor of the plaintiffs." This being a very close case on the facts, it was necessary that the jury be accurately instructed. As said in North Chicago Street R.R.Co. v. Cossar, 203 Ill. 608, "We think this instruction subject to the criticism made, and that the jury might well have inferred therefrom that if the plaintiff was in the exercise of due care at the instant when the accident occurred, then she might recover, although the evidence showed she was guilty of negligence in having placed herself in the position in which she found herself at the time of the collision." (See also Edwards v. Hill-Thomas Lime Co., 376 Ill. 180, 188.) The instruction is also objectionable in referring the jury to the complaint. (Bernier v. Illinois Central R.R.Co. 298 Ill. 464, 472).

Plaintiffs' given instruction number seven was in the language of certain parts of Par. 1, Ch. 95-1/2 Revised Statutes. It is our opinion there was no error in the giving of such instruction. (Deming v. City of Chicago, 381 Ill. 341.)

We do not consider that there is any merit to the contention that the court erred in the giving and refusing of certain other instructions.

For the reasons indicated the judgment of the trial court is reversed and the cause is remanded to such court for a new trial as to each plaintiff.

Reversed and remanded with directions.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1944

Term No. 44M1 Agenda No. 7



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| Sunflower Natural Gasoline Company, Defendant-Appellant, vs. O. E. Brown, Plaintiff-Appellee | Appeal from the Circuit Court of Marion County. |

STONE, P. J.

O. E. Brown, Plaintiff-Appellee, who will be hereinafter designated as plaintiff, filed suit in justice court against Sunflower Natural Gasoline Company, Defendant-Appellant, who will be hereinafter designated as defendant, to recover for wages alleged to be due him under a provision of an employment contract providing for two weeks vacation pay after an employee had completed two years service with defendant company.

Plaintiff recovered judgment against defendant in the justice court, in the sum of $122.48, which judgment was affirmed in the Circuit Court of Marion County, and defendant prosecutes his appeal to this court.

Principal errors relied upon for reversal are, that the judgment of the trial court was contrary to the law, contrary to the evidence and contrary to the law and evidence of the case. Other alleged errors assigned are more or less an elaboration of defendant's argument.

It is the contention of defendant, that plaintiff was not entitled to two weeks vacation pay, under an agreement between defendant and International Union of Operating Engineers, to which latter Union plaintiff belonged, said agreement in substance providing for one weeks vacation after one year's service, and two weeks vacation pay after the employee had completed two years' service with the employer, because of the fact that plaintiff had not completed two years service with the company, and because of the fact, as claimed by defendant, that plaintiff had voluntarily quit defendant's employ. The facts substantiating this theory were testified to principally by Glenn Wallace, superintendent of operations for defendant company, his testimony being to the effect that plaintiff's continuous service began about July 15, 1940, and that his third year would be up July 15, 1943, but that before that time plaintiff went out on strike. It appears from the record that plaintiff had one week's vacation, credited to his first year of service.

Plaintiff testified that he entered the employment of defendant on or about March 20, 1940, and continued in the construction of their Number One Refinery until the early part of April, 1940, at which time it was necessary to cease operation due to a lack of equipment essential to complete the plant. He claimed that he was notified by defendant that this was a temporary delay and that he would be notified when work could proceed, after the arrival of the necessary equipment, that upon the arrival of the parts, he returned to his employment with the company and remained in their employ until on or about June 1, 1943. Assuming that this were true, the evidence in the record with reference to whether or not plaintiff went out on strike after March 20, 1943, would be immaterial, as the vacation pay would have accrued previously to that time.

However, the question as to whether or not this was true, was the province of the trial court, hearing this case, without a jury. The reviewing court will not reverse the findings

of the trial court, in a trial without a jury, unless the findings are manifestly contrary to the weight of the evidence. People ex rel Hirsch vs. Nagel, 243 Ill. App. 490; Stephens-Adamson Mfg. Co. vs. Fireman's Fund Ins. Co. 257 Ill. App. 443; Wear Proof Mat Company vs. Bastian-Morley Co. 268 Ill. App. 455; Maton Bros. Inc. vs. Central Illinois Public Service Co. 269 Ill. App. 99, aff'd 356 Ill. 584.

We are not inclined to hold that the finding of the trial court was manifestly contrary to the weight of the evidence, and finding no reversible error, the judgment of the lower court will be affirmed.

AFFIRMED.

Abstract - Opinion

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1945

Term No. 45M1 Agenda No. 4

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|---|---|
| Reinhard Rixmann,<br>Plaintiff-Appellant,<br>vs.<br>C. W. Witwer and Nellie S. Witwer,<br>Defendants-Appellees | Appeal from the Circuit Court of Jefferson County. |

327 I.A. 205

Stone, P. J.

A complaint and cognovit and the note date of December 6, 1927, upon which the original action was based were filed by Reinhard Rixmann, Plaintiff-Appellant, hereinafter referred to as plaintiff, and judgment by confession entered in his favor and against, C. W. Witwer and Nellie S. Witwer, Defendants-appellees, hereinafter referred to as defendants, on December 21, 1939, by the Clerk of the Circuit Court of Jefferson County, at which time said Court was supposedly in vacation. Judgment was entered in the sum of Five thousand three hundred twelve dollars and sixty-seven cents, which included attorney's fees and costs of suit in the sum of five dollars.

On August 1, 1944, a verified motion, with supporting affidavit, was filed by defendants, to vacate and set aside as void, the judgment by confession, in which motion they entered a limited appearance for the sole purpose of objecting to the jurisdiction of the court. This motion alleged as grounds for the setting aside of the judgment, (1) That defendants did not reside in or execute the note in the county in which the judgment was entered, that they had never resided in Jefferson county and never owned any property in Jefferson county, during the preceding seven years; (2) Action on the motion was barred by the Statute of Limitations; (3) judgment by confession was void because it was entered by the Clerk while a term of court was in session. Thereafter on

August 9, 1944, defendants filed an amendment which alleged as additional ground that the cognovit confessed judgment in the amount of Five dollars only.

Motion to strike and dismiss defendants petition was filed by plaintiff on August 25, 1944, alleging in substance as grounds for dismissal; lack of diligence on the part of defendants; that there was a valid consideration for the note, and that the consideration had not been paid; that neither the motion or affidavit in support of it alleged facts showing fraud in procuring the execution of the note, or lack or failure of consideration therefor; that the note showed on its face that payments were made by defendants in the following amounts 10/1/28, cash $1,000.00; 11/3/28, cash $500.00; 12/9/30, Deed to White property; $800.00; that it appeared from the face of the cognovit that defendants confessed judgment in the sum sought; that it showed on its face that it was entered in vacation; that it appeared from the face of the motioh, affidavit and note, that defendants did not have a meritorious defense to the action.

The two motions were heard together, no testimony being taken at the hearing, and the Court denied plaintiff's motion to strike and sustained defendant's motion to vacate and set aside as void, the judgment by confession and entered its final order vacating and setting aside as void the judgment by confession, from which final order this appeal is perfected.

It is urged as error that the trial court erred in denying plaintiff's motion to strike; in sustaining defendant's motion, and in refusing to open the judgment and directing defendants to plead.

The same presumptions are indulged in favor of a judgment by confession entered in term time as in a judgment entered by service of process. Hansen vs. Schleginger 125, Ill. 230. The rule is different when the judgment is entered by confession in vacation. Farwell vs. Huston 151 Ill. 239. In the latter case a compliance with all the statutory requirements to authorize the confession of judgment must appear on the face of the record.

"The Statute (Chapt. 110, Sec. 174, Sub-section 5) provides, "that such application to confess judgment * * * shall be made in the County in which the note or obligation was executed, or in the County where one or more of the defendants reside, or in any County in which is located any property, real or personal, owned by any one or more of the defendants. A judgment entered by any Court in any County other than these herein specified, shall have no force or validity, anything in the power to confess to the contrary not-withstanding."

The motion of defendants' set up the fact that the judgment was not taken in any county specified as permissible in the Statute and the motion was supported by affidavit of both defendants, showing that the county in which application was made to confess a judgment, was not the county in which the note was executed or where one or more of defendants resided or was located any property owned by one or more of defendants. This was not controverted.

It is argued on behalf of plaintiff that this question as to venue is waived unless the question is raised at the earliest opportunity, and in support of this theory, cite the case of May vs. Charles O. Larson Co. 304 Ill. App. 137. In this case the defendant there first filed a motion to vacate the judgment asserting diligence and a meritorious defense and praying for leave to appear and file a counter-claim, which motion was denied. Defendant then moved to vacate the judgment, as having been entered in the wrong county, and the court held that the question of jurisdiction should have been raised in the first instance, and that by filing its original motion asking leave to appear and defend, defendant had submitted itself to the jurisdiction of the court and could not afterward raise the jurisdictional question. In the instant case defendants raised the jurisdictional question in their original motion on limited appearance. We are of the opinion that the May case is not controlling here.

It was apparently the intention of the Legislature that judgments by confession should be entered in the counties

specified or should be void. As the judgment was entered without jurisdiction the motion to vacate was not addressed to the Court's equitable powers, and it was not necessary to make a showing of diligence or meritorious defense, but only to call the court's attention to lack of jurisdiction. Duggan vs. Kupitz 301 Ill. App. 230; Genden vs. Bailen, 275 Ill. App. 382.

It is contended by plaintiff that the Statute of Limitations had been tolled by the payments and credits alleged to have been made by defendants, shown on the face of the note and although defendants motion recited that it was made under a special and limited appearance, it interposed the defense of limitation, and that therefore this constituted a general appearance.

In the case of Matzenbaugh vs. Doyle, 156 Ill. 331, judgment was taken in 1890 and after the issuance of a scire facias in 1893, defendant appeared and moved the court to vacate the judgment on the ground that at the time the judgment was entered the note appeared to be barred by limitation. The plaintiff, upon the hearing of this motion offered to show that several payments had in fact, been made, removing the bar of the statute. This offer was rejected by the Court and judgment vacated. The trial court's action was sustained by the Supreme Court, and at page 337 of the opinion that court uses the following language, "The rule that a defendant, to avail himself of the defense of the Statute of Limitations, must plead the statute, which the plaintiff now seeks to invoke, can have no application here, since, as the entry of the judgment by confession was purely exparte, no opportunity was afforded the defendant to set up such defense by plea. It became incumbent upon the plaintiff, therefore, to show affirmatively that his debt, which appeared to be more than ten years overdue, was in some way taken out of the operation of the statute, without such plea on the part of the defendant. As he failed to do so, the inference against him must be deemed to be conclusive that his debt was barred at the time he obtained

his judgment by confession and consequently, that the warrant of attorney was no longer operative."

In the instant case the plaintiff did not show affirmatively that his debt, was in some way taken out of the operation of the statute. The only entry on the face of the instrument, within the period of ten years is "12/9/30, Deed to White property $800.00." The mere production of a note bearing endorsements, if in open court, is not sufficient to toll the Statute of Limitations, without a showing that the endorsements were made by or by the authority of the maker. Lowery vs. Gear 32 Ill. 383; Waughop vs. Bartlet, 165 Ill. 124; William vs. Miner 179 Ill. 326; Mitchell vs Comstock, 305 Ill. App. 360. This endorsement, standing by itself, and without any showing as to what it meant or who it was entered by, or by whose authority it was entered, is not sufficient to take the case out of the rule laid down in the Matzenbaugh case.

We do not deem it necessary to discuss or pass upon other reasons urged, which would void the judgment of the lower court. For the reasons herein set forth, we find that the judgment of the court, entered December 21, 1939 was void, and the trial court did not err in denying plaintiff's motion to strike, and in sustaining defendant's motion to set aside the judgment by confession as void.

The judgment of the Circuit Court of Jefferson County will be affirmed.

AFFIRMED.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term A. D., 1945



Term No. 45M3 Agenda No. 2

| | | |
|---|---|---|
| MINNIE BARTELS, Administratrix of the Estate of Henry F. Bartels, Deceased, Plaintiff-Appellee, | ) | Appeal from the Circuit Court of Madison County, Illinois |
| vs. | ) | |
| DONALD McGARVLY, Defendant-Appellant. | ) | |

Bartley, J.

This is an action for wrongful death occasioned to plaintiff's intestate, a pedestrian, who was struck by the car of the defendant. This appeal is prosecuted from a judgment in favor of plaintiff-appellee for $5500.00 entered upon the jury's verdict. Defendant-appellant moved for a new trial, and in the alternative in arrest of judgment, which motions were denied by the court below.

The appellant assigns as errors that the complaint having failed to contain and ad damnum, that the judgment is fatally defective; that the greater weight of the evidence showed that plaintiff's deceased was guilty of contributory negligence proximately contributing to his injuries and death; that the greater weight of the evidence showed that the defendant was not negligent; and that the court erroneously gave, at the request of the plaintiff, Instruction No. 3, which is as follows:

"The Court instructs the jury that if you believe, from a preponderance of the evidence in this case, that the defendant saw plaintiff's intestate standing in East Broadway at the place of the accident in time to have warned plaintiff's intestate of the approach of his said automobile, and in time to have stopped said automobile and thereby avoided the accident, and if you further believe, from a preponderance of the evidence, that the defendant did not warn plaintiff's intestate of the approach of his automobile, and did not stop same before striking plaintiff's intestate, you should find the issues in this case in favor of the plaintiff, provided that you further believe, from a preponderance of the evidence, that at and immediately prior to the accident, plaintiff's intestate was in the exercise of due and ordinary care and caution for his own safety."

The plaintiff filed in this court a motion for leave to amend the complaint by adding thereto an ad damnum clause. This motion was granted by this court in pursuance to the provisions of The Practice Act relating to Amendments and because the appellant had not raised the question in the trial court. This question is therefore not now before the court.

The occurrence which resulted in the death of appellee's intestate was at the intersection of Broadway and Spring Streets, in the City of Alton. Broadway is paved with concrete, runs east and west, and has six

traffic lanes. It is intersected at right angles by Spring Street. The Luer Packing Company has a plant on the south side of Broadway which occupies the entire block west of Spring Street. About 1:00 A. M. on Sunday morning, July 2nd, 1944, appellant McGarvey and the witness Sanders, who roomed with him, started home from work. They proceeded east on Broadway in the McGarvey car with McGarvey driving. He was driving about 15 miles per hour and with the lights on the car burning. Some cars were parked along the south side of Broadway in this block and the appellant's car was in the traffic lane immediately next to the parked automobiles. As they approached the Broadway and Spring Streets intersection, the appellee's intestate was standing in the intersection about 8 or 10 feet out in Broadway from the south curb line. As to how long he had been there the record does not show, one witness stating that he had seen him at the intersection for about 30 minutes, another witness stating that he had seen him go out in the street a number of times as if he were looking for a car or bus to ride in. The evidence is in dispute as to whether the appellant honked his horn. It does appear that he applied his brakes and turned to the right in an endeavor to go between the deceased and the curb line. When the deceased moved, either by taking a few steps toward the car or in some other direction, the two came in contact as the result of which he received injuries from which he died.

The evidence in the case is brief. Two occurrence witnesses testified for the appellee. One witness, the occupant of the car with the appellant, testified for the appellant as to what happened in and about the occurrence

in question.

The first occurrence witness, William Weber, called by the appellee, testified that he was sitting in his room on the second story of a building located at the northwest corner of the intersection. He testified that he had seen the deceased standing on the corner for some 30 minutes or so, that he saw the deceased headed north come from the south side of Broadway out into the intersection a distance of about 8 feet from the south curb and look up and down the street, leading the witness to believe that he was looking for a bus or waiting for someone; that other cars were parked along the south curb of Broadway, the nearest one about 40 feet west of the intersection; that he saw the appellant's car come eastward but could not judge its speed and saw the appellant's car turn south into the Spring Street intersection, striking the deceased; that the deceased was knocked straight east on Broadway; and that he heard no horn sounded.

Appellee's other occurrence witness, Martin Hauhe, who lived at the southeast corner of the intersection of Spring and Broadway, testified that at the time of the accident, he was sitting on the doorstep in front of his house and heard the brakes being applied on the appellants car; that he looked westward and saw deceased standing in the street near the southwest corner of the intersection 10 to 12 feet north of the south curb, and at that time the deceased was faced west; that appellant's car had its lights lit and he saw appellant's car dodge to the right to go between the deceased standing in the intersection and the corner of the curbing at the southwest corner of the intersection; that the deceased then backed up two or three steps and the left front fender

of the appellant's car struck him; that when he first saw the man standing in the intersection, there was sufficient room between where he was standing and the curbing for the appellant's car to pass; that he heard the sound of brakes and horns blowing, but he could not tell whether it was appellant's car or not. He further testified that he saw the deceased walking out from the curb three times and that he looked west.

The only other occurrence witness was Maurice Sanders, who was a passenger in the car with the appellant. He testified that he was employed at Randall's Restaurant on East Broadway in Alton, and that he roomed with appellant; that the appellant was working in a tavern as bartender; that appellant closed the tavern at 1:00 A. M. and that the witness rode home with him. He testified further that Broadway is six lanes wide and that it is the main street through Alton running east and west; that he was not paying any attention to what was going on in front of the automobile; that he did not see appellee's deceased in the street until appellant applied the brakes and turned to the right; that appellant suddenly applied the brakes, turned to the right and went straight into Spring Street; that he did not notice Bartels until then; that he had not been paying any attention; that the route he and appellant were traveling does not cause them to turn into Spring Street; that he intended to continue on Broadway and that when the brakes were applied, that appellant tried to pull into Spring Street and that the impact knocked the deceased 8 or 10 feet; that when appellant applied the brakes approaching the intersection, he was not able to stop the car before he turned; that appellant was driving about 15 miles per hour, the lights

on his car burning.

From a reading of the foregoing recitation of the evidence of the eye-witnesses in question, which in substance was all that was offered or received as to what happened at the time and place of the occurrence in question, it becomes apparent that the questions involved in the litigation are negligence on the part of the appellant, proximate cause, and due care and caution on the part of appellee's deceased. These are questions of fact for the jury's determination under proper instructions of the court as to the law. Assuming that the jury was properly instructed as to law, whatever conclusion the jury reached, a court would not be able to say as a matter of law that the conclusion was contrary to the manifest weight of the evidence, whether that verdict was for the plaintiff or the defendant. Reasonable minds, from the evidence in the case, could well differ whether to find for the plaintiff or defendant. This court having reached this conclusion, it disposes of the issues raised that the verdict of the jury is contrary to the manifest weight of the evidence.

We come now to a discussion of the alleged error by the giving of Instruction No. 3, heretofore set out in full.

The law is well settled that where an instruction directs a verdict for either party or amounts to such a direction, then in such case it must necessarily contain all the facts which will authorize the verdict directed (Hanson vs. Trust Co. of Chicago, 380 Ill. 194.) From this principle of law must be determined whether or not Instruction No. 3 is erroneous, requiring a reversal of the case. Negligence, proximate cause, and due care are

all questions of fact for the jury to determine, and it is not for courts to take the questions from it and declare if certain facts exist, negligence is established, or that a certain result is proximately caused by the negligence, or that certain facts do or do not constitute due care (Pennsylvania Ins. Co. v. Frana, 112 Ill. 398, 404; Myers v. I. & St. L. Ry. Co., 113 Ill. 386, 389; City of LaSalle v. Kostka, 190 Ill. 130, 138-139; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 175; C. & N. W. Ry. Co. v. Hausen, 166 Ill. 623, 628).

The instruction complained of, appellee's No. 3, told the jury that if they believe from the preponderance of the evidence that the defendant saw plaintiff's intestate standing in East Broadway at the place of the accident in time to have warned plaintiff's intestate of the approach of his automobile, and in time to have stopped said automobile and thereby avoid the accident, and that the defendant did not warn plaintiff's intestate of the approach of his automobile and did not stop same before striking plaintiff's intestate, they should find the issues in favor of the plaintiff if they further believed from the evidence that at and immediately prior to the accident, plaintiff's intestate was in the exercise of due and ordinary care and caution for his safety. A cursory reading will show that this Instruction peremptorily directed a verdict without requiring the jury to determine whether the failure of the appellant to see appellee's intestate in time to have warned him of the approach of his automobile and in time to have stopped his automobile and avoid the accident, was due to negligence. It further told the jury in effect that if appellant saw the deceased in time to have stopped his automobile and avoid the

accident and that he did not do so, that such acts constituted negligence proximately causing the injuries and death in question. As to whether such failure to warn or failure to stop constituted negligence, were questions of fact under the law to be submitted to the jury for decision. If appellant saw the deceased standing in Broadway before the occasion in question, it was his duty to use reasonable care not to injure him, and such reasonable care could have consisted of other things besides warning and besides not stopping, notwithstanding warning and stopping may have been one way of avoiding the occurrence in question. No where in the Instruction does it require that the negligence, if any, must also be the proximate cause of the injury in order to sustain a cause of action.

The judgment of the Circuit Court of Madison County is therefore reversed and the cause remanded with instructions to the trial court to grant the appellant's motion for new trial.

REVERSED AND REMANDED.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1945

Term No. 45M11

Agenda No. 8

| | | |
|---|---|---|
| BERNARD SCHAEFER, Plaintiff-Appellant, vs. MARGARET THEN, Defendant-Appellee. | At Law No. 8981. | Consolidated Causes. Appeal from the Circuit Court of St. Clair County, Illinois. |
| JOSEPH THEN, Plaintiff-Appellee, vs. BERNARD SCHAEFER, Defendant-Appellant. | Appeal No. 9058 | |

Bartley, J.

This case brings to the court an appeal from two judgments entered in the Circuit Court of St. Clair County in two cases which were consolidated for trial in that court. One of these, Joseph Then vs. Bernard Schaefer, originated in a Justice of the Peace Court. It was filed in the Justice Court on July 14th, 1944, and resulted on August 17th, 1944, in a judgment in favor of the defendant, Bernard Schaefer, and against the plaintiff, Joseph Then, for costs of suit. The case was then appealed to the Circuit Court of St. Clair County. The other case being the one of Bernard Schaefer vs. Margaret Then, was filed in the Circuit Court of St. Clair County on August 9, 1944. The two cases arose from the same automobile collision and by order of the Circuit Court, were consolidated and tried together before a jury on November 14, 1944.

For some unexplained reason, when the cases were tried in the Circuit Court, the case of Joseph Then against Bernard Schaefer was treated by all parties and was tried as if Margaret Then was the plaintiff in the case. No point is made as to this by either side, and as before stated, all parties, including the court, acquiesced in the mistake.

The jury returned a verdict finding the defendant-appellant, Bernard Schaefer, guilty on the claim of Margaret Then (should be plaintiff-appellee, Joseph Then) and assessed plaintiff's damages at $50.00.

The other verdict returned by the jury found the defendant-appellee, Margaret Then, not guilty as to the claim of Bernard Schaefer, plaintiff-appellant.

On the same day that the verdicts of the jury were returned, the court entered judgment in favor of Margaret Then and against plaintiff, Bernard Schaefer, in bar of the action and for costs of suit, and also entered judgment in favor of Margaret Then and against Bernard Schaefer for $50.00 and costs of suit. This latter judgment should properly have been in favor of Joseph Then, but inasmuch as none of the parties made or do make any issue as to this, and all having acquiesced in the error, no further reference will be paid relative thereto, but the issues will be treated as if this judgment were in favor of Joseph Then.

The claim of Joseph Then was solely for property damage to his automobile, which was being driven at the time of the occurrence in question by his wife, Margaret Then. The complaint of Bernard Schaefer against Margaret Then, in addition to claiming property damage to his automobile, also alleged damages for personal injuries alleged to have been received by the plaintiff and defendant-appellant, Bernard Schaefer. Motions for judgment notwithstanding the verdict and for a new trial were each filed by the plaintiff and defendant-appellant, Bernard Schaefer, and each were

overruled by the court.

The errors assigned and argued by the plaintiff and defendant-appellant, Bernard Schaefer, as to why the judgment of the court should be reversed, are that the court erroneously gave appellees' Instruction No. 1, which pertained to which automobile has the right of way at an intersection; that the court should have directed a verdict in favor of the defendant-appellant as to the claim of the plaintiff-appellee, Joseph Then; and that the verdict is inconsistent with the proof and unsupported by the evidence wherein it awards $50.00 damages in favor of plaintiff-appellee and against defendant-appellant, whereas it is claimed the proof shows the damages to plaintiff-appellee's, Joseph Then's, car to have been $252.67.

The accident in question occurred on the 5th day of July, 1944, at or about 2:30 in the afternoon, at the intersection of Sixth and State Streets, in the City of East St. Louis. Sixth Street runs north and south, is paved, and is about 40 feet in width. State Street extends east and west, is paved, and is about 60 feet in width. State Street is a through or stop street, protected by stop signs requiring motorists to stop before entering it, and such signs were along either side of the street at Sixth Street at the time of the accident in question. Plaintiff and defendant-appellant was driving north on Sixth Street, approaching State Street, and defendant-appellee, Margaret Then, was driving her husband's, Joseph Then's, automobile west on State Street just before and at the time of the accident in question. From there on, the proof is in the main conflicting. According to the testimony of the plaintiff and defendant-appellant, upon reaching the intersection of Sixth and State Street, he brought his automobile to a stop at the south curb line of State Street. He explained that the reason he stopped at this particular point was that there is a building on that corner which obstructs the vision to the right,

and for that reason, it is necessary to stop at the curb line in order to be able to look east on State Street. He testified further, that at the time he stopped, there was no traffic from his left, and the only traffic approaching from the right was the automobile driven by defendant-appellee, Margaret Then, which automobile was at that time, approximately 300 feet east of the intersection; that he started to cross State Street in low gear at about 10 miles per hour, and that the front end of his car was even with the curb line on the north side of State Street when he was hit and turned over. How many times the car turned over, he does not know. He further testified that he did not know anything about the movement of the automobile driven by defendant-appellee, Margaret Then, any more after he started to cross the street; that he looked no more to the east; that he did not know how fast she was driving, and that he looked again to the west and saw no cars coming from that direction.

Lillian Ann Tourville was called as a witness by plaintiff and defendant-appellant and testified that at the time of the accident in question, she was walking north on Sixth Street, north of State Street, and looked back to see if her children were coming, and saw the two cars in question; that appellant's was coming north on Sixth Street and the other car was going west on State Street; that when she first saw the northbound car, it was in the middle of the street and was almost across the intersection before the westbound car reached it; that the westbound car was going at least 40 or 45 miles per hour; that she first saw the car when it was about a half a block away on State Street, which is a distance of about 300 feet, and that it was then going about 45 miles per hour.

Defendant-appellee, Margaret Then, testified that she was driving about 15 or 20 miles per hour when she approached the intersection of Sixth and State Streets; that between blocks she

drove about 20 or 25 miles per hour; that she had come from home and was going to a doctor's office; that there were riding with her two nuns that she had picked up on the street to give a ride; that she looked to the left when she reached the intersection of Sixth and State Street and did not see appellant's car, and that she saw it for the first time when it was about 3 feet from her car traveling about 35 miles per hour, and that she could not say whether it made a stop at the intersection; that appellant's car glanced off hers, rolled over, going to Sixth Street and rolled over against the northwest corner of Sixth Street and that the right hand side of appellant's car struck her car at the left hand side front along about the door of appellant's car.

Harry Wall, a police sergeant, testified to the location of the cars after the accident; that Mrs. Then's car was practically in the center of the intersection, facing north, and that Schaefer's car was over on the northwest curb on Sixth Street, on its side.

The two nuns riding with Mrs. Then were each called as witnesses. They testified that they were not acquainted with rates of speed but that Mrs. Then was not driving fast.

Photographs of the automobiles after the accident were offered in evidence as were photographs showing the street intersections.

The damages to appellant's car were repaired at a cost of $684.04. He received contusions about his head and nose, left arm and wrist, and abrasions on his face and arms and other parts of his body, and that he incurred doctor bills up to the time of the trial of the case of $112.00.

The automobile driven by defendant-appellee, Margaret Then, was repaired at a cost of $252.67. She testified that the repairs were all made necessary by the collision in question.

The Instruction complained of by appellant is as follows:

> "The Court instructs the Jury that under the statutes of the State of Illinois where two automobiles approach the intersection of two streets at or about the same time, the automobile to the driver's right has the right of way."

It will be noted that the Instruction is in substantially the same language as that of the statute pertaining to right of way at intersections, with the exception that it requires the automobiles to approach the intersection "at or about the same time".

Instructing a jury in the language of a statute is not error. It was so held in the case of Minnis vs. Friend, 360 Ill. 328, where on page 338, the court said:

> "Complaint is made of the 40th instruction given on behalf of the city of Chicago. It is in the language of paragraph 4 of section 33 of the Motor Vehicle act, (Cahill's Stat. 1933, p. 1893; Smith's Stat. 1933, p. 2515;) which gives the right of way 'in all cases' to fire department vehicles. Instructing the jury in the words of the law itself should not be pronounced error."

In the case of Lomax vs. Brooks, 315 Ill. App. 567, this court (Appellate Court of Illinois, Fourth District, on page 576, said:

> "It is finally contended that the court committed error in giving defendant's instruction, number one. A careful reading of this instruction discloses that it is an

instruction that did not direct a verdict, and is an instruction in the language of the law itself. Where an instruction is given in the language of a statute which is pertinent to the issues, it must be regarded as sufficient. Laying down the law, in the words of the law itself, ought not to be pronounced error (Deming v. City of Chicago, 321 Ill. 341; Minnis v. Friend, 360 Ill. 328)."

In the case of Geschwindner vs. Comer, 222 Ill. App. 417, this court (Appellate Court of Illinois, Fourth District) approved an instruction, in the language of an ordinance, which was in turn in the language of the statute pertaining to right of way at intersections.

The Supreme Court, in the case of Greene vs. Noonan, 372 Ill. 286, at page 293, when it had under consideration an instruction having to do with the statute relating to right of way, said:

"The statute as to right-of-way is clear."

As a matter of fact, the Instruction in question insofar as it related to the statute pertaining to right of way at intersections, was not applicable to the case in hand, because State street was a through highway with stop signs erected requiring those entering it from the north or south, to come to a stop. Traffic passing along the street, whether from the left or whether from the right, had the right of way over traffic entering the street from the south or from the north. It does not appear from the evidence whether the thorough-fare was a through street as being designated by the Department of Public Works and Buildings of the State, or whether it was such by reason of designation by the City of East St. Louis in pursuance of Section 86 of

Article 12 of the Motor Vehicle Act. In either event however, the rules of law would be the same, and the appellant, upon entering State Street, would be required to stop, and regardless of direction give the right of way to vehicles upon State Street.

The Instruction questioned in this case placed no more stringent duty on the appellant than would have an instruction pertaining to the law as related to the duty of motorists entering a through highway where stop signs had been erected under the statute or proper local authority. Nor do we see where the jury could have been misled by the instruction in the form it was in, under the facts in this case. We therefore hold that there was no error in the giving of the Instruction in question.

As to the alleged error that the court should have directed a verdict for the appellant as defendant to the claim of Joseph Then, the law is so well settled that it would be idle to cite authorities. Where there is evidence in the record fairly tending to support the position of the plaintiff, the case must be submitted to the jury. All that the evidence tends to prove and all just inferences to be drawn from it in plaintiff's favor must be conceded to the plaintiff. The credibility of the witnesses, the weight of the testimony, and the inferences to be drawn from facts proven, are all questions for the jury to pass upon, and not for a court to decide.

From a reading of the record, and from the recitation of the evidence hereinbefore set out, it clearly appears that the issues involved due care and caution, negligence and proximate cause, which were all questions of fact to be passed upon by the jury. The jury has passed upon them and the trial court has given its verdict his approbation by his refusal to grant a new trial. He and the jury were in the best positions to judge the ultimate facts to be drawn from the evidence and the ultimate conclusions to be reached in relation thereto.

We now come to the last ground urged as to why the case should be reversed, namely, that the verdict in favor of the plaintiff-appellee was $50.00, whereas the uncontradicted evidence showed that the damage to his car was $252.67. The alleged error is without merit authorizing a reversal of the case inasmuch as it is settled law in Illinois that one against whom a judgment has been rendered, cannot be heard to object, upon appeal, that the judgment was for too small an amount. (Becker vs. People, 164 Ill. 267; Moyers vs. Illinois Central Railroad Co., 197 Ill. App. 179; Smith vs. Stilley, 136 Ill. App. 602; Wilderman vs. Pitts, 39 Ill. App. 416.)

There being no reversible error in the record, the judgment of the Circuit Court is therefore affirmed.

AFFIRMED.

Abstract.

43314

SOL R. MALKIN, doing business as Malkin, Glick and Malkin,
Appellee,

v.

ARTHUR AUGUST, trading as Preferred Builders of Chicago, and also as Arthur August Lumber and Supply Company,
Appellant.

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ARTHUR AUGUST, trading as Preferred Builders of Chicago, and also as Arthur August Lumber and Supply Company,
Appellant,

v.

SOL R. MALKIN, doing business as Malkin, Glick and Malkin,
Appellee.



APPEAL FROM MUNICIPAL COURT OF CHICAGO.

70

MR. PRESIDING JUSTICE FRIEND DELIVERED OPINION OF THE COURT.

The plaintiff, Sol R. Malkin, an attorney associated with the firm of Malkin, Glick and Malkin, brought suit against the defendant, Arthur August, trading as Preferred Builders of Chicago and also as Arthur August Lumber and Supply Company, to recover attorney's fees for services alleged to have been rendered for defendant, and also to recover monies advanced by plaintiff in the course of litigation. About five months after plaintiff had filed his statement of claim defendant filed a counterclaim demanding trial by jury on his counterclaim. After the cause was brought to issue, defendant obtained several continuances and the hearing finally was set for a day certain with the admonition of the court that no further continuances would be granted. On the day set for hearing, defendant was unable to proceed with evidence in support of his counterclaim and asked to be nonsuited. The motion

4324

[illegible] R. [illegible], doing business as [illegible], Clerk and [illegible],

v.

[illegible], doing as Proprietors Builders of [illegible], and also as [illegible] [illegible] and supply Co [illegible],

[illegible]

[illegible], doing [illegible] Proprietors Builders of [illegible], and also as [illegible] [illegible] and supply [illegible],

v.

[illegible], [illegible] in [illegible] as [illegible], Clerk [illegible] [illegible],

[illegible]

The plaintiff, [illegible], an attorney associated with the firm of [illegible], [illegible], brought suit against the defendants, [illegible], doing business as [illegible] Builders of [illegible] and also as [illegible] and supply Co [illegible], to recover damages for a [illegible] alleged to have been done and for [illegible], and also to recover money advanced by plaintiff in the course of litigation. Some five months after [illegible] had filed his statement of claim [illegible] filed a counterclaim demanding trial by jury on his counterclaim. After the cause was brought to issue, a [illegible] obtained several continuances and the hearing finally was set for a day certain with the admonition of the court that no further continuances would be granted. On the day set for hearing, defendant was unable to proceed with evidence in support of his counterclaim and asked to be nonsuited. The motion

was allowed and his counterclaim was accordingly dismissed. The court then heard the case without a jury on plaintiff's statement of claim and the defendant's answer thereto, and entered judgment for plaintiff in the sum of $2028.07 and costs. Thereafter, pursuant to the issuance of an execution on the judgment, a levy was made on an interest owned by defendant in certain real estate, but the amount realized being rather inconsequential, plaintiff proceeded to garnishee defendant's bank account and secured a judgment against the garnishee for the full amount of the balance of the judgment. Defendant appeals both from the judgment in the original proceeding and the garnishment, and, upon motion, the two causes were here consolidated for hearing.

In the case under consideration defendant conceded on oral argument that the only questions remaining for determination were (1) the reasonableness of the plaintiff's charges or fees, and (2) the propriety of the court in trying the cause without a jury after defendant had elected to take a nonsuit on his counterclaim. Prior to the hearing defendant had asked for and obtained several continuances, and the matter was finally set specially for May 24, 1944 and on that day was continued to May 25, 1944. Defendant's counsel appeared without his client on May 25 and again asked for a continuance, but the court refused to grant his request and plaintiff thereupon adduced evidence as to the services rendered and monies advanced by him on behalf of defendant, his former client. Defendant failed or refused to produce any countervailing proof as to the reasonableness of plaintiff's charges, but his counsel did participate in the hearing by cross-examining plaintiff and one of his witnesses, a fellow lawyer who had testified as

was allowed and his counterclaim was dismissed. The jury, the court then heard the [illegible] jury on plaintiff's statement of claim and the defendant's counter-claim, and entered judgment for plaintiff in the sum of [illegible] and costs. Thereafter, pursuant to the issuance of an execution on the judgment, a jury [illegible] an interest owned by defendant in certain real estate, [illegible] the amount realized being [illegible] plaintiff [illegible] to satisfy defendant's bank account [illegible] against the garnishee [illegible] of the judgment. [illegible] in the original proceeding and [illegible] motion, the [illegible] were [illegible].

In his [illegible] on oral argument [illegible] the only [illegible] determination were [illegible] charges or fees, and [illegible] trying the [illegible] to take a nominal [illegible]. [illegible] defendant had [illegible] and the matter was [illegible] and on that [illegible] counsel appeared without his client or [illegible] asked for a continuance, but the court refused to grant his request and plaintiff thereupon adduced evidence as to the services rendered and monies advanced by him on behalf of defendant, his former client. [illegible] or refused to produce any corroborating proof as to the reasonableness of plaintiff's charges, but his counsel did participate in the hearing by cross-examining plaintiff and one of his witnesses, a fellow lawyer who had testified as

to the value of plaintiff's services. At the conclusion of the hearing the court indicated that in the absence of any defense and because the cross-examination had failed to "break down the witness' testimony," plaintiff was entitled to recover the full amount shown by his itemized statement of services. Defendant contends that the amount of the judgment is excessive and argues that neither the trial court nor the reviewing court is limited exclusively to the testimony of the plaintiff and a fellow-attorney as to the reasonableness of plaintiff's fees, but is duty-bound to examine and consider the record in the light of its own experience and determine what a reasonable fee would be. The law of the case presents little difficulty. In considering the advisory effect of testimony of fellow-attorneys on the value of services, opinions are receivable and entitled to due weight, but it has been frequently held that the courts are well qualified to form independent judgments on such questions, and it is their duty to do so. In McMannomy v. C. D. & V. R. R. Co., 167 Ill. 497, the court made the observation that "It is the duty of the courts to see that due regard is given to the rights and interests of clients, and that their decrees do not represent mere extravagant opinions of friendly attorneys as to what would be just and proper in a given case." In Gilbert v. Lloyd, 170 Ill. App. 436, the court said that "In passing upon decrees based on the findings of chancellors the appellate courts have frequently substituted their own opinions for those of the chancellor and the witnesses," and cited cases holding that such independent judgment had been exercised to the extent of fixing the precise fees to be allowed in many cases.

The amount of the judgment in this case is predicated

[illegible]

The amount of the judgment in this case is predicated

entirely upon the statement of services rendered, to which plaintiff testified, showing that from November 26, 1940 to July 21, 1942 plaintiff had devoted some 120 hours to the so-called "Kirby" case and additional time to other matters, and he and a fellow-attorney witness testified that by reason of plaintiff's experience and length of practice his time was reasonably worth $15.00 an hour. We find no fault with the hourly or per diem value of plaintiff's services as an attorney, but after a careful examination of the various items included in his statement, we have reached the conclusion that as to some of them, the time devoted to routine matters was excessive. For example, in several instances plaintiff claims that he spent from one to two hours in answering letters and communications from other counsel in the Kirby litigation which appear to be largely matters of routine; that he devoted ten hours to an examination of the complaint and filing his appearance on behalf of defendant, twenty-eight hours to the study and preparation of law necessary to prepare a motion to dismiss the complaint and to transfer it to law instead of chancery, and twenty-one hours to the preparation of a complaint to foreclose a mechanic's lien in Du Page County. From our examination of the record we are convinced that $1500.00 would have been a reasonable fee for plaintiff's services.

The only other question presented in this cause is whether the court erred in denying defendant trial by jury in the hearing of the complaint. As heretofore stated, defendant did not appear and was not prepared to submit any evidence in support of his counterclaim, and therefore elected to take a nonsuit; whereupon his counterclaim was dismissed. No jury demand was made by plaintiff, and

entirely upon the statement of services rendered, to which plaintiff testified, showing that from November 1, [illegible] to July 11, 1942 plaintiff [illegible] the so-called " Lady" case [illegible] matters, and to the [illegible] that by reason of [illegible] of practice his time [illegible] [illegible] plaintiff's services [illegible] examination [illegible] we have [illegible] time devoted [illegible] in several instances [illegible] to two hours in [illegible] other counsel in the [illegible] largely matters [illegible]; [illegible] examination of [illegible] behalf of [illegible] preparation of [illegible] the complaint [illegible] and twenty-one hours to [illegible] foreclose a [illegible] examination of the record [illegible] would have been a reasonable fee for plaintiff's services.

The only other question presented in this case is whether the court erred in denying defendant trial by jury in the hearing of the complaint. As heretofore stated, defendant did not appear and was not prepared to submit any evidence in support of his counterclaim, and therefore elected to take a nonsuit; whereupon his counterclaim was dismissed. No jury demand was made by plaintiff, and

defendant's demand for trial by jury on his counterclaim was made about five months after the original statement of claim was filed. Shellabarger v. Jacobs, 316 Ill. App. 191, appears to be in point on this question. Suit was there instituted by plaintiff against defendant for damages sustained through the collision of two automobiles. Jacobs, the defendant, filed his motion to strike the complaint on June 5th without demanding a trial by jury. Five days later he filed his counterclaim, and for the first time demanded a trial by jury. The trial court heard the cause without a jury and the matter was affirmed on appeal. The court said: "Jacobs contends the court erred in denying him a jury trial on the hearing of the complaint as amended. It will be noted that he filed his motion to dismiss on June 5th, which amounted to a general appearance. He did not file any jury demand until June 10th, which was five days after he had entered such general appearance by filing the motion to dismiss. Section 64 of the Civil Practice Act (ch. 110, Ill. Rev. Stat. [Jones Ill. Stats. Ann. 104.064]), provides that 'A defendant desirous of a trial by jury shall make such demand and file the same at the time of filing his appearance; otherwise such party shall be deemed to have waived a jury.'" See in addition to the provisions of section 64 of the Civil Practice Act, rule 59 of the Municipal Court of Chicago, which provides in effect that where defendant desires trial by jury he must file such demand at the time he enters his appearance, and also Standard Oil Company v. Patterson, 300 Ill. App. 385.

For the reasons indicated the judgment of the Municipal court is reversed and judgment is entered here

defendant's [illegible] trial by jury on [illegible] was made before trial [illegible] the original statement of claim was filed. [illegible] v. [illegible] appears to be in point in this question. [illegible] taken through the [illegible] the not right, [illegible] same [illegible] later in [illegible] demanded a trial by jury. [illegible] without a jury [illegible] court action [illegible] him a jury trial in [illegible] It will be noted that [illegible] same [illegible] when [illegible] not file any jury [illegible] the motion to dismiss. [illegible] at [illegible] 104 [illegible] by jury should make such [illegible] of filing his appearance; otherwise [illegible] deemed to have waived a jury. [illegible] provisions of section 64 of the Civil Practice Act, [illegible] of the municipal court of Chicago, which provides [illegible] that where defendant in [illegible] trial by jury [illegible] such demand at the time he enters his appearance, [illegible] Standard Oil Company v. Patterson, 240 Ill. [illegible]

For the reasons indicated the judgment of the municipal court is reversed and judgment is entered here

in favor of plaintiff for the sum of $1424.50 (which represents the difference between $1500.00 and $75.50, an amount already collected by plaintiff as the result of the sale of an interest owned by defendant in certain real estate), plus interest at 5% from May 25, 1944 to date and costs.

JUDGMENT REVERSED AND JUDGMENT ENTER IN FAVOR OF PLAINTIFF FOR $1424.50, PLUS INTEREST AT 5% FROM MAY 25, 1944 TO DATE AND COSTS.

Scanlan and Sullivan, JJ., concur.

in favor of plaintiff for the sum of $1500 and costs.

JUDGMENT REVERSED AND JUDGMENT HERE IN FAVOR OF PLAINTIFF FOR $1500 AND COSTS.

Scanlan and Sullivan, JJ., concur.

43315

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|---|---|
| SOL R. MALKIN, doing business as Malkin, Glick and Malkin, Appellee, | |
| v. | |
| ARTHUR AUGUST, trading as Preferred Builders of Chicago, and also as Arthur August Lumber and Supply Company, Appellant, | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |
| CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, a corporation, Garnishee. | |



MR. PRESIDING JUSTICE FRIEND DELIVERED OPINION OF THE COURT.

This appeal is consolidated with case No. 43314, wherein judgment in favor of plaintiff for $2028.07 was reversed and judgment entered here in his favor for $1424.50 plus interest ~~$1500.00~~ and costs. The facts are sufficiently set forth in that opinion, filed concurrently herewith, so that they need not be repeated here.

This appeal involves the validity of a garnishment proceeding instituted after judgment was obtained in cause No. 43314. On oral argument defendant's counsel conceded that if plaintiff was entitled to judgment, "the garnishment case falls," and no argument whatever was made with respect to the validity of the garnishment proceeding. Judgment having been entered for plaintiff, the validity of the garnishment judgment need not be further considered. However, in order to make the judgment in garnishment conform to the reduced amount of the principal judgment, the garnishment judgment is reversed and judgment entered here in garnishment in favor of plaintiff in the sum of $1,424.50 (which represents the difference

between $1500.00 and $75.50, an amount already collected by plaintiff as the result of the sale of an interest owned by defendant in certain real estate), plus interest at 5% from May 25, 1944 to date, and costs.

JUDGMENT IN GARNISHMENT REVERSED AND JUDGMENT HERE IN FAVOR OF PLAINTIFF FOR $1424.50, PLUS INTEREST AT 5% FROM MAY 25, 1944 TO DATE, AND COSTS.

Scanlan and Sullivan, JJ., concur.

between $1500.00 and $75.50, an amount already collected by plaintiff as the result of the sale of an interest owned by defendant in certain real estate), plus interest at 5% from September 25, 1944 to date, and costs.

JUDGMENT IN GARNISHMENT REVERSED AND JUDGMENT HERE IN FAVOR OF PLAINTIFF FOR $1424.50, PLUS INTEREST AT 5% FROM SEPTEMBER 25, 1944 TO DATE, AND COSTS.

Scanlan and Sullivan, JJ., concur.

43262

PATRICK H. McCORMACK,
Appellee,

v.

THOMAS J. FRIEL and CHARLES C. RENSHAW, as Trustees, etc., et al., doing business as CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action to recover damages for injuries sustained by plaintiff when he fell in a street car on February 17, 1942. A jury returned a verdict for $7,500 and defendants appeal from the judgment entered upon the verdict.

Defendants strenuously contend that the verdict is against the manifest weight of the evidence and that, therefore, the trial court erred in refusing to grant them a new trial. Plaintiff's theory of fact is that he boarded the front end of a Madison street car at the southwest corner of Madison and Dearborn streets and paid his fare to the conductor; that as he did so he glanced ahead and saw an unoccupied seat about six or seven feet from where he was standing; that he then proceeded rearward "holding on the back of the seat, and finally when I got to the seat just in front of the unoccupied seat, I retained my hold on the seat and prepared myself to sit down, and just as I was ready to sit down, a terrible jerk occurred that threw me ten feet * * * and I landed right in the back, at the extreme end of the car"; that the jerk broke his hold on the seat; that when the jerk took place the car was "maybe fifty feet on Dearborn" going south; "maybe seventy-five feet"; that the car started to move as soon as he got on it and had turned the corner into Dearborn street when he

reached the conductor; that the unoccupied seat that he saw was about six or seven seats from where he stood when he paid his fare; that he was lying on the floor of the car at least fifteen minutes when the policemen carried him to an ambulance and took him to Mercy hospital. Defendants' theory of fact is that after plaintiff boarded the street car on Madison street and had paid his fare the street car continued to stand at Madison and Dearborn streets until the traffic light changed; that plaintiff seated himself in the street car; that the street car went around the curve at Madison and Dearborn streets and proceeded south on Dearborn street without any jerking or unusual motion and at ordinary speed to the stopping place on Dearborn street at Monroe, where it stopped and discharged and took on passengers; that the car then started up and proceeded around the curve from Dearborn street into Monroe street without any jerking or unusual motion and at ordinary speed; that while the street car was making this turn plaintiff got up from his seat and undertook to walk to another seat when he lost his balance and fell without any negligence on the part of defendants; that nothing happened to plaintiff as the car proceeded from Madison street to Monroe street; that after plaintiff fell the street car was placed on a dead track at LaSalle street, where the police placed plaintiff on a stretcher, carried him to an ambulance, and took him away to the hospital. Plaintiff was seventy-six years of age at the time of the accident. He had been for years a dining car steward but had retired from work about four and one-half years before the accident. Plaintiff's theory of fact is supported by his testimony alone. Six witnesses supported the theory of fact of defendants and three of them appear to be entirely

reached the conclusion that the [illegible] that he
was about six or seven [illegible] to stop when
he pulled his foot [illegible] on the floor of the car
at least fifteen minutes when the police [illegible] to
an ambulance and took him [illegible] hospital. [illegible] that
theory of fact is that after [illegible] street
or on Jefferson street [illegible] car
continued to stand [illegible] until
the traffic light [illegible] street in
the street car; that [illegible] at
Jefferson and [illegible] on the street car
stopped without any [illegible] traffic
speed to [illegible] car
where it stopped [illegible] that
the car [illegible] from
Jefferson street [illegible] or
[illegible] motion [illegible]
car was [illegible] car
and took [illegible] walk to [illegible]
and full [illegible] that
that nothing [illegible] reasonable from
Jefferson street to [illegible] street
the street car was [illegible] the street,
where the police [illegible] plaintiff [illegible] carried
him to an ambulance, and took him away to the hospital.
Plaintiff was seventy-[illegible] years of age at the time of the
accident. He had been for years a [illegible] car attendant but
had retired from work about four and one-half years before
the accident. Plaintiff's theory of fact is supported by
his testimony alone. Six witnesses supported the theory of
fact of defendants and three of them appear to be entirely

disinterested witnesses. Counsel for plaintiff, in a strained effort to justify the verdict, are forced to argue: "There are undisputed physical facts, gravity, momentum, inertia, impetus, acceleration, - silently, relentlessly, testifying for the plaintiff; hard facts, convincing facts, corroborating the plaintiff, disputing, denying, and destroying defendants' evidence." We are firm believers in the jury system and are in full accord with the rule stated by the Supreme court in People v. Hanisch, 361 Ill. 465, 468, that "The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury." We are satisfied, however, after a careful analysis of the evidence, that the verdict of the jury in the instant case cannot be sustained. In weighing the evidence we were bound to consider plaintiff's uncorroborated testimony as to the manner in which the accident occurred in the light of his personal interest in the suit.

Defendants also contend that the court erred "in giving and refusal of instructions;" that plaintiff's given instruction No. 3 was erroneous in that it limits the question of due care to the conduct of plaintiff "at the time of the injury." The instruction was a mandatory one and it requires no citation of authorities to support defendants' contention that the instruction should have required plaintiff to exercise reasonable care for his own safety at the time of the injury and just prior thereto. Defendants also contend that the trial court erred in refusing to give their instruction No. 28. This instruction reads as follows: "28. While the jury are the judges of the credibility of the witnesses, they have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defendants

simply because such witness was or is an employee of the defendants, but it is the duty of the jury to receive the testimony of such witness in the light of all the evidence, the same as they would receive the testimony of any other witness, and to determine the credibility of such employee by the same principles and tests by which they determine the credibility of any other witness." Plaintiff's contention that this instruction was covered in a special instruction given to the jury by the court is without merit. Plaintiff also contends that the trial court was justified in refusing to give the instruction upon the ground that it assumes that the employee of defendants was unimpeached. We have always considered that this instruction, a so-called stock instruction, is justly subject to the criticism made by plaintiff, but it has been approved in a number of cases and we must therefore hold that the instruction should have been given.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

43288

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| JOHN PROCHASKA, a Minor, by Charles Prochaska, his Father and Next Friend, and FRANK L. FORREST, JR., a Minor, by Frank L. Forrest, his Father and Next Friend, Appellants, | ) | APPEAL FROM SUPERIOR COURT OF COOK COUNTY. |
| v. | ) | 32 I.A. 203 |
| H. A. DeCOSTA, Appellee. | ) | |

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A personal injury suit commenced against the following defendants: National Tea Company, a corporation; Provident Mutual Life Insurance Company, a corporation; City of Chicago, a municipal corporation; Ida G. Swickel; R. V. Lumley; Christiana Lumley, his wife; Helen E. O'Brien; Louis Magno; Frank Chappel; H. A. DaCosta; Sam Alexander, doing business as Lake Park Market, and Sam Penner, doing business as Penner Drug Company. Sometime prior to the trial plaintiffs "settled" their claims against the National Tea Company; Sam Alexander, doing business as Lake Park Market; Louis Magno; Sam Penner, doing business as Penner Drug Company, and, perhaps, other defendants. When the case was called for trial only three defendants remained, viz: City of Chicago, Provident Mutual Life Insurance Company and appellee, H. A. DeCosta. During the trial, in some way not shown by the record, City of Chicago and Provident Mutual Life Insurance Company ceased to be defendants. The jury returned a verdict finding defendant H. A. DeCosta guilty and assessing plaintiff Frank L. Forrest, Jr.'s damages at $2,200. A verdict was also returned finding defendant DeCosta guilty and assessing plaintiff John Prochaska's damages at the sum of $1,700. Three interrogatories were submitted to the jury, all of which were answered. We will later refer to these

JOHN PROCHASKA, a minor, by Charles Prochaska, his father and next friend, [illegible]

POWELL, JR., a minor, by Frank L. Powell, his father and next friend,

[illegible]

v.

R. A. Delaney,

[illegible]

IN. THE CIRCUIT COURT [illegible]

A personal injury [illegible] to [illegible] the plaintiffs [illegible] defendants [illegible] to [illegible] mutual life insurance [illegible] a municipal corporation [illegible] Metropolitan Life [illegible] Frank Cuppel, [illegible] Robert [illegible] Alexander [illegible] Lake Park District, and [illegible] Company. [illegible] prior to the trial [illegible] claims against the [illegible] business [illegible] business [illegible] then the case [illegible] for trial and [illegible] mained, [illegible] company and [illegible] During the trial, [illegible] some may not show [illegible] mutual life [illegible] jury returned a verdict [illegible] and assessing [illegible] $2,200. A verdict was also [illegible] guilty and assessing plaintiff [illegible] sum of $1,700. These interrogatories were submitted to the jury, all of which were answered. [illegible] will later refer to these

interrogatories. Defendant DeCosta filed a motion to enter judgment for him notwithstanding the verdicts and set up eleven grounds in support of the motion. It is only necessary to refer to the eleventh ground, which was that the finding of the jury as to interrogatories one and two were inconsistent with and contrary to the general verdict. The trial court sustained the motion, set aside the general verdicts, and entered a judgment in favor of defendant and against both plaintiffs, holding that the said special findings were inconsistent with the general verdicts and that the former controlled the latter. The court's action was based upon Section 65 of the Civil Practice Act. Plaintiffs appeal from the judgment entered.

Plaintiffs' original complaint, filed January 5, 1940, alleged, in substance, that on August 3, 1939, defendants Helen O'Brien; R. V. Lumley; Christiana Lumley, his wife; Ida G. Swickel; H. A. DeCosta; Provident Mutual Life Insurance Company, a corporation, and Frank Chappel owned, operated, managed and controlled certain properties on Lake Park avenue and on 44th place, "in the rear of which there was a large yard abutting on the alley aforesaid, and so connected therewith that it was not possible to distinguish where the yard ended and where the alley began"; that "National Tea Company, a corporation, Louise Magno, Sam Alexander, doing business as the Lake Park Market, and Sam Penner, doing business as the Penner Drug Company, were tenants of the aforesaid buildings"; that "at the said time and place, the plaintiffs, being children of tender years, were proceeding down the alley aforesaid, a place where they had a lawful right to be, when a pile of debris located in the alley aforesaid, and in the yard aforesaid, in which pile of debris there were explosive materials, exploded, causing injuries to the plaintiffs as hereinafter

alleged"; that "it then and there became and was the duty of all these defendants to so keep and maintain the yard and alley aforesaid, free of dangerous and destructive agencies and materials, but that in violation of such duty, these defendants did put and place, permit to be put and placed, and did keep certain destructive and explosive agencies and materials in the said pile of debris in the alley and yard aforesaid"; that "the said condition, to-wit, the pile of debris containing destructive and explosive agencies and materials was known to all these defendants, or by the exercise of reasonable diligence could have been known to them, but regardless of their duty in the premises, these defendants wholly failed and neglected to remove the said pile of debris aforesaid, or in any other way to fulfill their duty to persons rightfully in the said alley and yard aforesaid"; that "as a direct and proximate result of the violation of their duty by these defendants as aforesaid, and in consequence thereof, the plaintiffs were then and there severely hurt."

The evidence showed that for a number of years prior to the accident in question the yard or vacant lot described in the complaint had been used as a dumping place by many people and the lot was always covered with rubbish, etc.; that the City of Chicago when it cleaned the streets made a practice of dumping all sorts of garbage, rubbish and other stuff there every day. In his opening statement to the jury counsel for plaintiffs stated that he would show that the City of Chicago made a practice of dumping all sorts of garbage and rubbish on the vacant lot. Charles Prochaska, the father of John Prochaska, testified that the City had dumped rubbish and other stuff there ever since he lived in the neighborhood. Tenants of the building threw rubbish, etc., from their windows upon the lot. The parents of the minor plaintiffs also placed rubbish there.

On May 17, 1940, the National Tea Company took the depositions of the two minor plaintiffs; attorneys for all of the parties appearing at the proceeding. Frank Forrest, Jr., then testified that he and other small boys had been in the habit of playing in the yard in question; that on the day of the accident he and John Prochaska were walking down the alley on the way home for lunch when John said, "How about having a pop stand?" and that he (Frank) said, "O.K."; that they saw some boxes that the National Tea had thrown out and they went and got them; that they found them a few feet from the wall of the National Tea Company; that they intended to have a pop stand in his back yard; that the man at the National Tea told them they could take the boxes to make up a stand; that he, Frank, held a box in his hand; that there was "a bonfire there in that lot"; that "we seen a bottle and we took the bottle up and we were both trying to get it and I had my hand on this and Jackie had his hand on one part and the cork blew off"; that "Jackie was trying to take it away from me"; that they had put the box down on the ground; "and when the cork went off Jackie says, 'Well, let's see what is inside of the bottle,' and we looked inside of the bottle and it was empty because it was a dark one"; that "we threw it away and all of a sudden it exploded. Q. The bottle exploded? A. No, the fire. Q. Oh, did you throw the bottle in the fire? A. We threw it near it"; that it was not a big fire; that "the National used to burn stuff * * * they usually burned sticks and stuff like that that they had from the things, but I didn't notice what was burning"; that "everybody used to throw rubbish there and they still do"; that they (the minor plaintiffs) threw the bottle down to make a crash, but that it was too big a crash; that when the bottle landed it remained there for a couple of minutes "and then it went boom"; that the fire that was burning was not in the rubbish pile and

the rubbish pile was not burning. The following occurred in the examination: "Q. Well, did you ever see anybody start a fire? A. Well, once in a while we seen the man from the National start one. Q. You did? A. Yes, sir. Q. Where did he start it? A. He started it right around there. Q. Right around where? A. Well, mostly he would start it right around that place where I showed you on the picture. Q. Here the fire was? A. Yes, sir. Q. Did you see somebody else start a fire there? A. No, sir." The witness further testified that when he looked in the bottle it was empty; that it was not the bottle that they threw that exploded, that it was something else in the fire. John Prochaska testified that the bottle they found was a milk bottle, with the word, "'Capital', that's all, on it"; that there was nothing in the bottle; that he and Frankie tussled for the bottle and that he, the witness, retained it; that he did not throw the bottle into the fire; "Q. Did this bottle fall in the fire? A. The bottle that we had? A. [by examiner] Yes. A. No, sir"; that while he was holding the bottle in his hand something exploded.

After the depositions were taken, plaintiffs filed, on January 8, 1941, an amended complaint, which alleged that the defendants who were tenants of the said buildings and the yard abutting upon the alley were the users of the yard, "and piled rubbish, debris, refuse, flourdust, potash, magnesium, potassium chlorate, and other explosives in the said yard, contributing to the nuisance"; that the said pile of rubbish, etc., constituted a nuisance, attractive and tempting to children, and that the said rubbish, etc., were the proximate cause of the injuries inflicted upon plaintiffs; that "at the said time and place, the plaintiffs, being children of tender years, were proceeding down the alley aforesaid, a place where they had a lawful right

to be, when the pile of rubbish, debris, refuse, flourdust, potash, magnesium, potassium chlorate and other explosives located as aforesaid, exploded, causing injuries to the plaintiffs as hereinafter alleged"; that plaintiffs were boys of tender years and were attracted to said pile, which was burning; that said place was unenclosed and adjacent to the public alley, with no guards or other protection provided for minor children in a place where the children were in the habit of playing; that all of the defendants put and placed on the said pile of debris various explosives; that defendants Swickel, Lumley and his wife, O'Brien, Chappel and Alexander put and placed rubbish, debris and refuse upon the pile and permitted others to place upon the pile dangerous explosives; that "the National Tea Company, a corporation, did, by its agents and servants in that behalf, set fire to the said pile of rubbish, debris, refuse, flour dust, potash, magnesium, potassium chlorate, and other explosives, and did keep and maintain the said fire leaving the said fire unguarded, and making it a dangerous nuisance, attractive to children, and to which children of tender years were attracted because of natural childish curiosity and instinct"; that as a direct and proximate result of the violation of their duty by defendants plaintiffs were injured.

The trial commenced on February 15, 1944, and on February 21, 1944, the day before the trial ended, which was four and one-half years after the accident happened, plaintiffs filed another amendment to the amended complaint, in which they charged, for the first time, that defendant DeCosta took a lighted match and lit the pile of debris in question so that the said pile became and was ignited and burned, causing the explosion referred to in the amended complaint; that DeCosta in setting fire to the said pile violated Section 2819 of the

Ordinances of the City of Chicago and left the said fire unguarded, although he knew that the place of the fire was a place where children were in the habit of congregating and playing; that as a proximate result of said setting fire by defendant DeCosta to the said pile the fire caused the contents of said debris to explode, injuring plaintiffs; that DeCosta failed and neglected to put the fire out but permitted it to remain burning and thereby caused the said explosion. It will be noted that when this last amendment was filed DeCosta was the sole defendant on trial. It will be further noted that after the minor plaintiffs had testified in the deposition hearing plaintiffs filed the amended complaint in which they charged that the National Tea Company set fire to the pile of rubbish, etc., maintained the fire and left it unguarded and that as a result thereof plaintiffs were injured. We make these observations at this time because defendant DeCosta strenuously contends that after plaintiffs settled with the National Tea Company and other defendants, and he was the sole defendant upon trial, plaintiffs abandoned the position they had taken against the National Tea Company and attempted to substitute DeCosta as the one who started and maintained the fire and left it unguarded.

The following are the three special interrogatories or findings which were submitted to the jury:

"1. Do you find from a preponderance of the evidence in this case and under the instructions of the court that the defendant, H. A. DeCosta took a lighted match and lighted the pile of debris thereby causing the explosion as alleged by the plaintiffs?

"2. Do you find from a preponderance of the evidence in this case and under the instructions of the court that the defendant, H. A. DeCosta left the contents of the

[illegible]

or findings which were [illegible] to the jury:

"1. Do you find from a preponderance of the evidence in this case and under the instructions of the court that the defendant, [illegible] Decoate took a lighted match and lighted the pile of debris thereby causing the explosion as alleged by the plaintiffs?

"2. Do you find from a preponderance of the evidence in this case and under the instructions of the court that the defendant, [illegible] Decoate left the contents of the

fire burning and knew or by the exercise of ordinary care could have known that in doing so it was dangerous for children who were playing on the premises?

"3. Do you find from a preponderance of the evidence and under the instructions of the court that the defendant, H. A. DeCosta should have known or could have known by the exercise of ordinary care on his part that there were upon said vacant lot or in or upon the pile or piles of debris on said vacant lot explosive and dangerous materials?"

To the first and second interrogatories the jurors answered, "No." To the third interrogatory they answered, "Yes." Plaintiffs contend that "the special interrogatories were improperly submitted to the jury because the answer thereto could not control the result or affect the general verdict." We agree with this contention so far as it applies to the third interrogatory, but we cannot agree with the contention so far as it applies to interrogatories one and two. The last amendment to the complaint charged that DeCosta set fire to the pile of rubbish, etc., left the fire unguarded, neglected to put it out, and that the fire caused the contents of the debris, etc., to explode, thereby causing the injuries the minor plaintiffs sustained; "that as a proximate result of the said setting fire by the defendant, H. A. DeCosta, to the said pile of debris as hereinbefore described, the fire caused the contents of the said debris, or parts of them, to explode, injuring these plaintiffs," and plaintiffs went to the jury upon the aforesaid theory of facts. We think the special findings of the jury as to the interrogatories were completely inconsistent with the general verdicts of guilty and that they controlled the general verdicts. Plaintiffs rather feebly argue that the special findings to interrogatories one and two were against the manifest weight of the evidence, but, in our opinion, no intelligent jury

fire burning and run or by the exercise of ordinary care could have known that in doing so it was dangerous for children who were playing on the premises.

"3. Do you find from a preponderance of the evidence and under the instructions of the court that the defendant, A. A. Decosta should have known or could have seen by the exercise of ordinary care on his part that when it was upon said vacant lot or in or upon the pile or piles of debris on said vacant lot explosive and dangerous substances?

To the first and second interrogatories the jurors answered, "No." To the third interrogatory they answered, "Yes." Plaintiffs contend that "the general interrogatories were improperly submitted to the jury, and because the answer thereto could not control the result or affect the general verdict." We agree with this contention so far as it applies to the third interrogatory, but we do not agree with the contention so far as it applies to interrogatories one and two. The last amendment to the complaint charged that defendant set fire to the pile of rubbish, etc., left the [illegible] to put it out, and that the fire caused the contents of the debris, etc., to explode, thereby causing the injuries the minor plaintiffs sustained; that as a proximate result of the said setting fire by the defendant, A. A. Decosta, of the said pile of debris as hereinbefore described, the fire caused the contents of the said debris, or parts of them, to explode, injuring these plaintiffs," and plaintiffs went to the jury upon the aforesaid theory of facts. We think the special findings of the jury as to the interrogatories were completely inconsistent with the general verdicts of guilty and that they controlled the general verdicts. Plaintiffs rather feebly argue that the special findings to interrogatories one and two were against the manifest weight of the evidence, but, in our opinion, no intelligent jury

could have answered "Yes" to the said interrogatories under all the facts and circumstances in the case. It is true that upon the trial Frank Forrest, Jr., testified that in May of 1943 he saw DeCosta start the fire right around where they were, and that this fire was still burning when he and John Prochaska came out on the lot, and that he did not see anybody else start a fire; that he had also seen the National Tea store start a fire in the vacant lot, but not on the day that he was hurt; but in his deposition the only defendant that he mentioned that he ever saw start a fire was the National Tea Company. Indeed, he testified positively that he never saw anybody else start a fire there. It is also true that John Prochaska, minor plaintiff, testified upon the trial that he saw DeCosta "light a match ready to this pile of rubbish" just before the explosion. In his deposition he gave no such testimony. In fact, he stated positively that he did not see anyone start the fire that was burning when they got there. A careful reading of the entire depositions of the two minor plaintiffs shows that neither of them mentioned DeCosta in his testimony. Plaintiffs contend that the answers of the jury to interrogatories one and two were not controlling because they ignore the allegation in the amended complaint that DeCosta by his agents and servants put and placed on the said pile of debris, etc., explosives and containers containing vitriolic materials, chemicals and powders. The trial court was of the opinion that there was no evidence to sustain these allegations, and we are in accord with the court's views in that regard. The general charge in the amended complaint that the defendants put and placed upon the said pile of debris, etc., explosives, found no support in the evidence. There is no proof that any explosion had occurred prior to the day in question or that any defendant had any ground for believing that there were explosives in the pile.

could have answered "Yes" to the said last propositions under all the facts and circumstances in the case. It is true that upon the trial Frank Cressel, Jr., testified [illegible] of light he saw [illegible] about the fire which around [illegible], and that this fire was still burning when [illegible] on the lot, and that he did not [illegible] fire; that he has also seen the [illegible] in the vacant lot, but not on the [illegible] was burning, but in his deposition the only [illegible] that he over saw about [illegible] to testified [illegible] fire alone. It is also true that [illegible] tiff, testified upon the trial [illegible] matter to this point of [illegible] in his deposition [illegible]. In fact, [illegible] positively that [illegible] burning when [illegible] discussions of the [illegible] the [illegible] and placed on the [illegible] pile of [illegible], etc., [illegible] containers containing [illegible] powders. The trial court was of the opinion that there was no evidence to sustain these allegations, and we are in accord with the court's views in that regard. The general charge in the amended complaint that the [illegible] and placed upon the [illegible] pile of debris, etc., explosives, found no support in the evidence. There is no proof that any explosion had occurred prior to the day in question or that any defendant had any ground for believing that there were explosives in the pile.

This is not a case where a defendant left explosives unguarded in a place accessible to children. It is a case that presents a common dump for rubbish, garbage, and the like. Defendant DeCosta introduced in evidence certain of plaintiffs' pleadings upon the ground that they were in the nature of admissions made by plaintiffs, and counsel for plaintiffs now makes the rather extraordinary claim that because defendant introduced these pleadings in evidence the allegations of facts contained in them have the effect of evidence and the jury had the right to give evidenciary weight to these allegations. It is difficult for us to believe that such a contention is seriously made. It would appear that counsel for plaintiffs is of the opinion that liability in the instant case can be fixed by conjecture or guesswork, for he argues that "all we have to do is to show that the actions of the defendant or his agents <u>were the probable cause of the explosion</u>." The rule as to the degree of proof required of plaintiffs is that they prove their case by a preponderance of the evidence. This means that upon the questions of fact which plaintiffs are required to prove they must have a greater weight, or preponderance, of evidence. The contention, strenuously urged by defendant, that plaintiffs' case against defendant DeCosta is subject to grave suspicion, is justified by the record.

The judgment order of April 15, 1944, of the Superior court of Cook county is affirmed.

JUDGMENT ORDER OF APRIL
15, 1944, AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

43321

GUSTAVE KOCH,
Plaintiff-Appellant,

v.

NETTIE B. STEVENSON et al.,
Defendants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

A. F. WALDSCHMIDT, Treasurer of Township 36 North, Range 14 East, Cook County, Illinois; BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 153 OF COOK COUNTY, ILLINOIS; SCHOOL DISTRICT NO. 153 OF COOK COUNTY, ILLINOIS, and GREAT AMERICAN INDEMNITY COMPANY, a corporation,
Defendants-Appellees.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Nettie B. Stevenson, Executrix of the Last Will and Testament of George A. Stevenson, deceased; Nettie B. Stevenson; Edwin Stevenson; George A. Stevenson, Jr.; Jeannette Morse; Helen Ranney; Bayard T. Stevenson; Ralph Ranney; Great American Indemnity Co. of New York, a corporation; Nettie B. Stevenson, as former Treasurer of Township 36 North, Range 14 East, Cook County, Illinois, and as Ex Officio Treasurer of School District No. 153; A. F. Waldschmidt, Treasurer of Township 36 North, Range 14 East, Cook County, Illinois, Ex Officio Treasurer of School District No. 153; Board of Education of School District No. 153, of Cook County, Illinois, and School District No. 153, Cook County, Illinois, a quasi municipal corporation. The defendants whose names are italicized were not served with process and did not file an appearance. To an amended complaint filed all of the other defendants filed their motions to dismiss and for judgment against plaintiff for costs. The motions were sustained and plaintiff appeals from a decretal order entered upon the

motions.

The amended complaint is a lengthy pleading. In substance, its material allegations are: That about 1923 School District No. 153, in Cook county, through its Board of Education, was engaged in a school building program and was in need of moneys for its building fund; that George A. Stevenson was then Treasurer of Township 36 and ex officio Treasurer of said School District; that in 1923 plaintiff paid to Stevenson as such Treasurer $5,000, and said School District received the benefit of the same; that at the same time plaintiff received in exchange the tax anticipation warrant or warrants of said Board in a like amount, payable from the taxes levied for educational and building purposes; that the warrants provided for interest at six per cent per annum, and that between 1923 and 1932 payments of principal were made to plaintiff by said Treasurer in the total sum of $2,000, with interest on the unpaid principal to the date of each payment; that each time a payment was made on account of the principal indebtedness the tax anticipation warrant then held by plaintiff was surrendered and a new warrant was delivered to him for the balance then due; that on June 28, 1932, the last exchange of warrants was made and plaintiff received a warrant for $3,000, payable from the 1930 levies; that thereafter said School District and said Board of Education, through the Treasurer of said School District, paid to plaintiff certain items of interest on said indebtedness (enumerating them); that on September 15, 1936, said School District paid to plaintiff $300 on account of the principal of said indebtedness, and on December 8, 1937, paid $300 on account of said principal, leaving unpaid a balance of $2,400.00 on the principal indebtedness; that plaintiff is still the owner and possessed

of said instrument in writing; that about the same date said School District also issued to various persons, firms and corporations other tax anticipation warrants, a large number of which were delivered to the Homewood State Bank, totaling not less than $13,000, and a number of such instruments, totaling $16,900 were delivered to a large bank in Chicago; that subsequently said School District and said Board of Education, through its Treasurer, has paid its said indebtedness to said banks but has failed and refused to pay to plaintiff the balance due him, has failed and refused to pay the interest on the balance and has repudiated any and all obligation to pay such indebtedness or to refund to plaintiff said sum of money paid by him to the Treasurer of said School District; that George A. Stevenson was Treasurer of said Township 36 and ex officio Treasurer of said School District from 1923 until his death, which occurred during his last term that commenced in 1936; that Jeannette B. Stevenson, his widow, succeeded him, her term commencing January 8, 1938, and ending June 30, 1938; that A. F. Waldschmidt, defendant, succeeded her as Treasurer and is still in said office; that defendants Bayard T. Stevenson, Nettie B. Stevenson and Ralph Ranney were sureties on George A. Stevenson's official bond as said Treasurer during certain terms of office of said Stevenson; that defendant Great American Indemnity Company of New York, a corporation, was surety on Stevenson's bond during his last term of office and was surety on defendant Jeannette B. Stevenson's bond during her term of office. The amended complaint then alleges that George A. Stevenson and defendants Jeannette B. Stevenson and A. F. Waldschmidt, during their respective terms of office as Treasurer of Township 36 and as ex officio Treasurer of School

District No. 153, misappropriated and misapplied and converted to other uses the moneys received by them which could have been lawfully applied on the indebtedness due plaintiff, but have applied such moneys and funds in payment in full of other debts and obligations, such as the obligations and debt due the Homewood State Bank and said bank in Chicago, and have failed and refused to make like payment to plaintiff, although the amount due him was of the same grade as the indebtedness due said banks; that plaintiff is informed and believes that such discrimination against plaintiff was made at the request of the Board of Education of said School District and sundry persons who were members of said Board of Education; that by and through the action of said School District, its Treasurer and Board of Education said District has illegally enriched itself at the expense of plaintiff; that all funds coming into the hands of said School Treasurers during their respective terms of office were trust funds for the payment of the obligations and debts of said District to all persons entitled thereto alike and without discrimination or preference; that upon an accounting had of all the receipts and disbursements of said District of the various funds and moneys coming into its treasury it will appear that sufficient of such funds were received by the respective treasurers of said School District to pay the amount due plaintiff in full; that the books and records of said School District and its Treasurers relating to the receipts and disbursements for the period commencing with the year 1923 are voluminous and complicated, and that an accounting of the collection and disbursements of moneys received by it can be had only in a court of equity; that plaintiff cannot now, without an accounting, fix the amount

of moneys received by said defendants, or some of them, which could and should have been paid to plaintiff; that the failure of said Board and its Treasurers to recognize their obligation to plaintiff and to refund to him the money advanced and paid by him to the Treasurer of said School District was a breach of the trust, duties and obligations of defendants; that by reason of the death of George A. Stevenson, defendants Nettie B. Stevenson, Edwin Stevenson, George A. Stevenson, Jr., Jeannette Morse and Helen Ranney are liable to plaintiff as the heirs, devisees and distributees of the estate of George A. Stevenson for any amount that may be found due him; that defendants Bayard T. Stevenson, Nettie B. Stevenson, Ralph Ranney and Great American Indemnity Company of New York, a corporation, are also liable to plaintiff as sureties on the several official bonds given by said George A. Stevenson as Treasurer of Township 36 and as ex officio Treasurer of School District No. 153 for any amounts that may be found to be due plaintiff from George A. Stevenson; that defendant Great American Indemnity Company is also liable to plaintiff as surety on the official bond of said Nettie B. Stevenson for any moneys that said Nettie B. Stevenson should have rightfully paid to plaintiff, by reason of the failure of said Stevenson to faithfully perform her duties of office. The amended complaint then alleges "that the defendant, A. F. Waldschmidt, the present Treasurer of Township 36 * * * is liable to the plaintiff for any moneys received by him as Treasurer, either from his predecessor in office or from other sources, which should be rightfully paid to the plaintiff as aforesaid." The amended complaint prays: (a) That defendants set forth fully a just and true account of the several acts and doings with respect to receipts and disbursements of all moneys received by or for said

District for the years 1923 to date, particularly with reference to any and all receipts of tuition fees and other receipts in addition to moneys received as a result of taxes levied; (b) That an accounting may be had; (c) That it be determined whether moneys collected which could have or should have been applicable to payment of plaintiff's claim, have been or are now withheld, or have been commingled, diverted or misapplied; (d) That the court determine by its decree that all proceeds of money coming to the hands of defendants or any of them, which could or should have been applied to plaintiff's claim, became and were upon receipt thereof a trust fund in the hands of such persons to be held by them as trustees for the sole and exclusive benefit of plaintiff; (e) that the court determine which of the defendants are liable to plaintiff and the extent of such respective liabilities; that defendants be required to disclose the names and addresses of any other persons who participated in the receipt of moneys paid on claims of the same character as the claim of plaintiff, and to determine the names and addresses of those persons, firms or corporations whose claims were paid in full, and that upon such determination the court enter its judgment against the several defendants found liable; (f) That if it shall be found that defendants or any of them have repudiated any agreement or understanding between the defendants, said School District, said Board of Education and George A. Stevenson, its former Treasurer, and plaintiff, either express or implied, to repay to plaintiff the moneys so paid by him to said Treasurer for its building fund as aforesaid, that then plaintiff may have a decree or judgment against the defendants to refund and return to plaintiff said sum of $5,000, less the payments made by defendants, together with interest at the legal rate on such balance; (g) That plaintiff may have such other and further

District for the years 1923 to date, particularly with reference to any and all receipts of tuition fees and other receipts in addition to moneys received as a result of taxes levied; (b) That an accounting may be had; (c) That it be determined whether moneys collected which could have or should have been applicable to payment of plaintiff's claim, have been or are now withheld, or have been commingled, diverted or misapplied; (d) That the court determine by its decree that all proceeds of money coming to the hands of defendants or any of them, which could or should have been applied to plaintiff's claim, became and were upon receipt thereof a trust fund in the hands of such persons to be held by them as trustees for the sole and exclusive benefit of plaintiff; (e) that the court determine which of the defendants are liable to plaintiff and the extent of such respective liabilities; that defendants be required to disclose the names and addresses of any other persons who participated in the receipt of moneys paid on claims of the same character as the claim of plaintiff, and to determine the names and addresses of those persons, firms or corporations whose claims were paid in full, and that upon such determination the court enter its judgment against the several defendants found liable; (f) That if it shall be found that defendants or any of them have repudiated any agreement or understanding between the defendants, said School District, said Board of Education and George A. Stevenson, its former Treasurer, and plaintiff, either express or implied, to repay to plaintiff the moneys so paid by him to said Treasurer for its building fund as aforesaid, that then plaintiff may have a decree or judgment against the defendants to refund and return to plaintiff said sum of $5,000, less the payments made by defendants, together with interest at the legal rate on such balance; (g) That plaintiff may have such other and further

relief in the premises as to the court shall seem meet.

At the outset, it must be noted that the instant cause was dismissed only as to the defendants who filed the motions to dismiss, viz: Board of Education of School District No. 153 of Cook County, Illinois; School District No. 153 of Cook County, Illinois; A. F. Waldschmidt, Treasurer of Township 36, and Great American Indemnity Company, a corporation. As the Stevenson group of defendants were not before the court, no action was taken as to them. Plaintiff, by obtaining proper service against them, has the right to enforce any cause of action he may have against them. In the brief filed on behalf of the Board of Education, the School District, and the present Township Treasurer it is stated that plaintiff was entitled to an accounting from George A. Stevenson whenever he became dissatisfied with the revenue paid to him by Stevenson from the collection of the tax levies against which he held an assignment, and had the full right to demand an accounting; that his remedy is against the officer to whom the tax was paid. In our view of this appeal it is unnecessary for us to consider the charges in the amended complaint that affect only the Stevenson group.

In People v. Hayes, 365 Ill. 318, it was held that tax anticipation warrants are not the obligation of the issuing municipality. In Berman v. Board of Education, 360 Ill. 535, it was held that tax anticipation warrants do not constitute any promise of payment, either express or implied, on the part of the taxing body issuing them and they constitute no obligation between the taxing body and the purchasers or holders of the warrants, as the issuance of such a warrant discharges the taxing body from all liability on account of the obligation for which the warrant was drawn, and when it is issued and accepted or sold the transaction is closed on the part of the

municipality, leaving no future obligation upon it, either absolute or contingent, whereby its debt may be increased, and that an Act of the legislature authorizing the Board of Education of the City of Chicago to issue bonds for the purpose of paying unpaid anticipation warrants was unfair to tax payers and unconstitutional as violating due process of law. The court states (pp. 541, 542): "We have held that a tax imposed for the payment of a debt not incurred by the authority imposing the tax, and for the payment of which it is in nowise responsible, is not for a corporate purpose; * * * From these and numerous other authorities it seems clear that tax anticipation warrants are not debts and do not represent direct legal obligations of the municipality issuing them. It follows that an appropriation and levy for their payment must fail, since not for a corporate purpose. Where the money is not due as a result of any promise, contract or debt of the municipality, little justification can be found for an appropriation to pay private holders of tax anticipation warrants the moneys which they have failed to collect from the sources to which such collections are exclusively confined. An appropriation for such a purpose certainly could not be deemed an appropriation for a corporate purpose." In Dimond v. Commissioner of Highways, 366 Ill. 503, it was held that when a tax anticipation warrant is issued and accepted or sold, the transaction is closed on the part of the municipality or taxing body, leaving no future obligation upon it, either absolute or contingent, whereby its debt may be increased, as the holder of the warrant must rely upon the specific fund set apart for its payment, and the acts of June 26, 1931, and of June 21, 1933, making such warrants payable out of "any available revenues, derived from taxes or otherwise," other than the fund anticipated, violate section 9 of article 9 of the due process clause of

the constitution. In Leviton v. Board of Education, 374 Ill. 594, it was held that a tax anticipation warrant is simply an assignment of tax money which directs the treasurer to pay the holder, and such warrant can be presented to the tax collector in full discharge of taxes against the holder, and that no debt is created by a tax anticipation warrant, and after delivery there is no future obligation upon the municipality, either absolute or contingent, to pay out of anything except the levy anticipated, when collected, and that an Act of the legislature authorizing the said Board to issue bonds to pay off judgments entered upon unpaid anticipation warrants was void under section 9 of article 9 of the constitution. In In re Estate of Stevenson, 318 Ill. App. 178 (appeal denied, 321 Ill. App. xiv), it was held that when a school board undertakes to issue warrants payable out of taxes of a subsequent year and deliver them in exchange for and in payment of warrants payable out of taxes of a prior year, it is issuing such warrants without statutory authority and such warrants are void, and hence the estate of the school district treasurer sued on the theory that the treasurer failed to turn over to holders of the warrant moneys received from the tax levy which should have been applied to its payment, could not be held liable.

The original complaint filed in the instant cause sought to recover upon the last tax anticipation warrant, issued to plaintiff about June 28, 1932, and plaintiff's counsel states that when that complaint was filed the opinion in In re Estate of Stevenson, supra, had not been filed, and that when the Supreme court refused an appeal in that case the original complaint was abandoned; that plaintiff's amended complaint is not based upon the last tax anticipation warrant issued, which he now holds; that "Two remedies are sought by the

the constitution. In [illegible] v. [illegible] 1924, it was held that [illegible] assignment of a [illegible] holder, and [illegible] in full discharge of [illegible] is created by [illegible] there is no "[illegible] absolute or conditional [illegible] anticipated, when [illegible] authorized the [illegible] entered upon [illegible] 2 of article 9 of the [illegible] 118 III. App. [illegible] that when a school [illegible] out of the [illegible] for sum in payment of [illegible] year, it is [illegible] which may not [illegible] instead the [illegible] to turn over to holders [illegible] tax levy which should [illegible] not be held liable.

The original complaint [illegible] to recover upon the [illegible] plaintiff about June 24, 1932, and [illegible] that when that complaint was filed the [illegible] of Stevenson, supra, had not been filed, and that when the supreme court refused an appeal in that case the original complaint was abandoned; that plaintiff's amended complaint is not based upon the last tax anticipation warrant issued, which he now holds; that "two remedies are sought by the

complaint. One is the return of the unpaid balance of the money, which the plaintiff paid to the district, under the theory of money had and received, because through the facts [acts] and representations of officials connected with the district plaintiff was deprived of his valid and enforcible instrument showing money due him, namely, the original tax warrant. The other remedy sought is an accounting by the school district and its treasurer and other officials to determine whether or not the school district or its treasurer now has on hand or should have on hand any proceeds of tax levies that could and should have been lawfully applied on the indebtedness due plaintiff, and whether or not there are other funds and moneys in the possession or control of any of these defendants out of which plaintiff's claim can be paid"; that "The principal cause of complaint, as set forth in the complaint, is that plaintiff was induced to surrender his original warrant on payment of something on account thereof and the issuance of a new warrant against the subsequent year's tax levy (under a practice apparently extensively followed by taxing bodies until such warrants were declared illegal), and was thereby, as it was discovered later, deprived of the valid obligation he held, while the school district and its officials retained the money they had received from him and in addition to that repudiated any liability." We note, however, that the amended complaint does not seek to compel defendants to surrender to plaintiff the tax anticipation warrant delivered to him in 1923, nor does it seek to have that warrant reinstated or revived in any way; nor does the amended complaint allege that plaintiff ever offered to return the tax anticipation warrant issued to him in 1932 upon the return to him of the warrant issued to him in 1923. Indeed, the original complaint assumed that the procedure

complaint. One is the [illegible] of the money, which the [illegible] the [illegible], under the theory of [illegible] and [illegible], [illegible] the [illegible] [acts] and [illegible] the [illegible] plaintiff's [illegible] showing money [illegible] other [illegible] and the [illegible] not [illegible] or should have [illegible] or should have [illegible] title, [illegible] possession or [illegible] plaintiffs [illegible] [illegible] [illegible] [illegible] was [illegible] consolidation [illegible] against the [illegible] apparently [illegible] warrants were [illegible] discovered [illegible] while the [illegible] they had received [illegible] any liquid [illegible] does not seem to [illegible] the tax [illegible] does it seem to have that warrant [illegible] or received in any way; nor does the amended complaint allege that plaintiff ever offered to return the tax [illegible] warrant issued to him in 1932 upon the return to him of the warrant issued to him in 1923. Indeed, the original complaint assumed that the procedure

followed was legal and proper, and the suit was based upon the failure of certain of the defendants to pay the 1932 warrant.

The present contention of plaintiff (clearly an afterthought) that the Board of Education, the School District and the present Township Treasurer are liable to plaintiff for the return of the unpaid balance of the money he claims is due him upon the tax anticipation warrant, under the theory of money had and received, is, in our judgment, without the slightest merit. No matter what theory plaintiff may adopt, his claim must be based upon the written assignment of taxes that he received in 1923. It is conceded that when plaintiff made his payment of $5,000 in that year, he received a valid and legal tax anticipation warrant. When that transaction was consummated it left no future obligation upon the Board of Education, the School District or the Township Treasurer. Plaintiff could only be paid from the taxes levied and assigned, and his remedy, if he has a just complaint, is against the officials who received any of the revenue from the taxes that were assigned to plaintiff by his warrant or warrants given to him in 1923. As counsel for the aforesaid defendants state: "The county clerk's ratebook contains the total assessed valuation of all property in the school district and the total rate extended. The county collector's books show the total revenue received and his deductions or charges for extension and collection. The uncollected taxes were readily ascertainable"; "to allow a recovery for money had and received would obviously do indirectly what the Supreme Court has repeatedly held cannot be done directly." Plaintiff has cited certain cases in support of its position, but they are clearly distinguishable from the instant proceeding upon the facts. They announce the rule that when a payment has been made to a municipality, which was illegally collected, the person making the payment has a

right to recover the same in an action for money had and received; recovery was allowed upon the theory that the payments made were illegal or void. If we are right in holding, as we do, that there can be no recovery against the Board of Education, the School District or the present Township Treasurer, said defendants are not called upon to account to plaintiff.

As to the present Township Treasurer: He did not take office until July 1, 1938, which was fifteen years after plaintiff purchased the tax anticipation warrant in 1923. It is sufficient to say, as to this officer, that the amended complaint does not allege that he ever received any of the revenue from the taxes that were assigned to plaintiff in 1923, and, therefore, the complaint fails to state a prima facie case as to him. The argument made in behalf of this official, that it is clear that the taxes assigned to plaintiff were collected by the County Collector and paid over to Stevenson as Township Treasurer in the year or years immediately following 1923, and that the suit as to said official is in the nature of harassment, appeals to us. As the amended complaint failed to make out a prima facie case against this official there is no necessity for him to account to plaintiff.

As to defendant Great American Indemnity Company: It appears from the complaint that this company was surety upon a bond given by George A. Stevenson on July 1, 1936, when he was School Treasurer. Said defendant was also surety on a bond given by Jeannette B. Stevenson when she was School Treasurer from January 8, 1938, until June 30, 1938. As heretofore stated, the order appealed from does not apply to the Stevenson group. Plaintiff concedes that the said company, as surety, would not be liable until the liability of the Stevensons, or one of them, had been established,

but he states that if the dismissal order as to the said company is affirmed it will become necessary for plaintiff to bring suit against that company after the liability of the Stevensons has been established. It is apparent that if plaintiff has any just claim it is against the Stevensons. If he secures a judgment against the Stevenson group, or any of the members of that group, he will then have a right of action against the instant surety company. We are satisfied that the trial court, in view of the state of the record as to the Stevenson group, did not err in dismissing the cause as to the surety company.

The decretal order of the Circuit court of Cook county is affirmed.

DECRETAL ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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|---|---|---|
| CLARA E. SUSSIN, Appellee, | ) | |
| | ) | APPEAL FROM CIRCUIT |
| v. | ) | |
| | ) | COURT, COOK COUNTY. |
| VICTOR SUSSIN, Appellant. | ) | 32 Ill. App. 210 |

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 21, 1938, Clara E. Sussin, plaintiff, obtained a decree of divorce from defendant, Victor Sussin, on a charge of desertion. On April 4, 1944, plaintiff filed in the proceedings a verified petition praying "that an order be entered herein, ordering and directing Victor Sussin, the defendant herein, to pay to her the sum of Three Thousand Dollars with interest at the rate of three per cent per annum, from December 1st, 1938, pursuant to said decree." After answer filed by defendant, the chancellor, upon motion of plaintiff, struck defendant's answer "as being insufficient in law," and ordered defendant to pay to plaintiff within ten days $3,000 with interest thereon in the sum of $535 "pursuant to said decree." Defendant appeals from that order.

The record in the divorce proceedings shows that the parties had no children and that they had entered into a settlement agreement in writing as to alimony and certain property rights, and that the agreement was introduced in evidence and incorporated by agreement in the report of proceedings. It contains eleven paragraphs. The first six pertain to alimony, the payment of certain bills, and the disposition of certain household furniture and personal property. They also contain an agreement by defendant to convey to plaintiff all right, title and

interest, including the claim for dower and homestead which he may or might hereafter acquire against any of the property, real, personal or mixed, owned or possessed by plaintiff or which she may hereafter own or possess; also a like agreement by plaintiff in reference to any property defendant may have or might hereafter have; also an agreement by defendant to pay the expenses of plaintiff incurred in the prosecution of the divorce action. There is no claim by plaintiff that defendant failed to carry out any of his agreements that are contained in the first six paragraphs, and therefore it is not necessary to quote said paragraphs verbatim. The pertinent provisions are the Seventh, Eighth, Ninth and Eleventh. They read as follows:

"WHEREAS, on the 13th of December, 1929, there was borrowed the sum of Six Thousand Dollars ($6,000.00) from J. E. McCauley, and to secure the payment of said sum of $6,000.00, a note was executed which was signed by both of the parties hereto, and as collateral for said note, mortgages belonging to the party of the first part were given: and

"WHEREAS, there is still due on said loan approximately the sum of Two Thousand Five Hundred Dollars ($2,500.00) with unpaid interest, and the said J. E. McCauley is still holding as collateral for said loan, the securities belonging to the said party of the first part: and

"WHEREAS, the said party of the first part has claimed that the said party of the second part should pay the balance due on said $6,000.00 loan, and further to pay her the amount heretofore paid on said loan which has been derived from the sale of some of the securities put up as collateral for said loan.

interest, including the claim for lower [illegible] to be said which he may or might hereafter acquire against any of the property, real, personal or mixed, owned or possessed by [illegible] or which she may hereafter own or possess; also a lien [illegible] by plaintiff in her [illegible] property [illegible] have or might hereafter have; also [illegible] to pay the expenses of plaintiff's [illegible] in the [illegible] of the divorce action. There is no [illegible] that defendant failing to [illegible] that are contained in the [illegible] is not in [illegible] the [illegible] provisions [illegible] Clover". [illegible] and as follows:

"WHEREAS, on the [illegible] borrowed the sum of [illegible] of [illegible] Company, and to secure the payment of said [illegible] of the parties hereto, [illegible] mortgage [illegible] given and

"WHEREAS, there is [illegible] the sum of [illegible] unpaid interest, [illegible] as collateral for said loan, [illegible] the said party of the first part and

"WHEREAS, the said party of the first part has [illegible] that the said party of the second part also [illegible] due on said [illegible] loan, and further to pay for the account heretofore paid on said loan which has been derived from the sale of some of the securities put up as collateral for said loan.

"NOW, THEREFORE, it is further agreed between the parties hereto, in consideration of the premises and of the mutual covenants and agreements herein contained, as follows: -

"SEVENTH: - That the said party of the second part will pay to the said party of the first part, on or before the first day of January, A. D. 1944, the sum of Three Thousand Dollars ($3,000.00) at Chicago, Illinois, with interest thereon at the rate of Three (3) per cent. per annum after the date of the execution of this Agreement. Said interest, however, to be accumulative and all of the interest shall be due and payable at the time said principal amount is due and payable.

"EIGHTH: - It is further agreed that in the event of the death of the said party of the first part, prior to January 1st, 1944, or any other time thereafter to which the time of payment of said $3,000.00 may have been extended, that then and in that event, the obligation of the party of the second part to pay said $3,000.00 and interest, shall cease, and there shall be no obligation on his part to pay any part of said amount to the estate of the party of the first part.

"NINTH: - It is further agreed that in the event the said party of the second part is called upon to pay any portion of the unpaid balance due on the McCauley loan, that then and in that event, any such amount as may be paid by him on the McCauley loan, will be credited against the $3,000.00 obligation above set forth.

"TENTH: - * * *

"ELEVENTH: - It is mutually agreed between the parties hereto that paragraphs FIRST, SECOND, THIRD, FOURTH, FIFTH and SIXTH shall become a part of the record in the divorce proceedings now pending in the Circuit Court of Cook County,

Illinois and shall be incorporated in any decree of divorce entered in this cause."

Upon the hearing in the original proceedings plaintiff was interrogated by her own counsel, counsel for defendant, and the chancellor, in reference to the settlement agreement. In response to questions put to her by her attorney she stated that she had examined the agreement, that she was satisfied with its provisions at the time that they were entered into, and that she was still satisfied with them. The following occurred during her examination: "Mr. Chabash [attorney for defendant]: Q. Mrs. Sussin, in the agreement there is a clause that refers to a settlement of your differences for three thousand dollars, and you understand that is not to be a part of this decree, but is to remain a part of the agreement? A. Yes." In response to questions put to her by the chancellor she stated that she understood the agreement, knew what it meant, and was satisfied with it. The decree of divorce contains, inter alia, a finding that plaintiff and defendant had executed a written agreement and that a copy of the agreement had been incorporated in the certificate of evidence filed in the cause, and "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Agreement between the parties hereto with respect to their financial affairs and the payment of alimony and maintenance to the plaintiff, Clara E. Sussin, by the defendant, Victor Sussin, be and the same is hereby approved." The decree then proceeds to give force and effect to the agreement by including verbatim the First, Second, Third, Fourth, Fifth and Sixth paragraphs of the agreement and ordering the parties to comply with the provisions of the same. The decree does not order nor direct defendant to pay to plaintiff the sum of $3,000 referred to in paragraphs

Illinois and shall be incorporated in any decree of divorce entered in this cause."

Upon the hearing in the original proceedings plaintiff was interrogated by her own counsel, counsel for defendant, and the chancellor, in reference to the settlement agreement. In response to questions put to her by her attorney she stated that she has examined the agreement, that she was satisfied with its provisions at the time that they were entered into, and that she was still satisfied with them. The following occurred during her examination:

"Mr. Chabsah [attorney for defendant]: Q. Mrs. Bussin, in the agreement there is a clause that refers to a settlement of your differences for three thousand dollars, and you understand that is not to be a part of this decree, but is to remain a part of the agreement? A. Yes." In response to questions put to her by the chancellor she stated that she understood the agreement, knew what it meant, and was satisfied with it. The decree of divorce continues, inter alia, a finding that plaintiff and defendant had executed a written agreement and that a copy of the agreement had been incorporated in the certificate of evidence filed in the cause, and "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the agreement between the parties hereto with respect to their financial affairs and the payment of alimony and maintenance to the plaintiff, Clara R. Bussin, by the defendant, Victor Bussin, be and the same is hereby approved." The decree then proceeds to give force and effect to the agreement by including verbatim the First, Second, Third, Fourth, Fifth and Sixth paragraphs of the agreement and ordering the parties to comply with the provisions of the same. The decree does not order nor direct defendant to pay to plaintiff the sum of $3,000 referred to in paragraphs

Seventh, Eighth and Ninth of the agreement, nor is there any reference to said sum in the decree.

In her petition filed April 4, 1944, plaintiff states that she had demanded the payment of the said sum of $3,000 from defendant but that he has failed and refused to pay said sum. Defendant's answer to the petition admits the entry of the decree and that he entered into the agreement of December 1, 1938; that plaintiff introduced the agreement as an exhibit in the divorce proceedings and that it became a part of the transcript of proceedings in the cause; that only the first six provisions of the agreement were incorporated in the decree and that he has faithfully and fully complied with all of said provisions; that in accordance with the agreement no order was entered against him in the decree as to the $3,000 item; that the entry of the order prayed for in plaintiff's petition at this time would be an alteration and modification of the divorce decree, which became final over five years ago; that the court was without jurisdiction to make such alteration or modification of the decree and that plaintiff has only her remedy at law to enforce the agreement as to the $3,000 item; that she cannot invoke the contempt powers of the divorce court to enforce a part of the agreement which the parties expressly agreed was not to be incorporated in the decree and which, in fact, did not become a part of the decree. Defendant in his answer prays that the court deny the prayer of plaintiff and dismiss her petition. Plaintiff moved to strike defendant's answer for insufficiency in law, and the chancellor entered an order striking the answer of defendant "as being insufficient in law," and ordering defendant to pay within ten days to plaintiff the sum of $3,000 together with interest thereon "pursuant

seventh, tenth and ninth of the agreement, nor is there any reference to such sum in the decree.

In her petition filed April 4, 1[illegible], [illegible] that she had demanded the payment of [illegible] from defendant by [illegible] said sum. Defendant's answer to the petition [illegible] of the decree [illegible] of December 1, 1[illegible] as an oblight in the [illegible] a part of the [illegible] only the first [illegible] provided in the decree [illegible] compliance with all of said stipulations [illegible] the agreement no order was entered [illegible] as to the [illegible] the plaintiff's [illegible] and nothing than of [illegible] over five years after the [illegible] to make such [illegible] that plaintiff has [illegible] agreement as to the [illegible] contempt powers of [illegible] the agreement which the parties [illegible] to be incorporated in the decree [illegible] not become a part of the decree. Defendant in his answer prays that the court deny the prayer of plaintiff's [illegible] her petition. Plaintiff moved to strike defendant's answer for insufficiency in law, and the chancellor entered an order striking the answer of defendant "as being insufficient in law," and ordering defendant to pay within ten days to plaintiff the sum of $3,000 together with interest thereon "pursuant

to said decree," entered in the divorce proceedings.

As defendant strenuously argues, it is difficult to understand upon what theory of law or fact the chancellor entered the order in question. It is clear that Judge Finnegan omitted from the decree in the divorce case all reference to paragraphs Seventh to Ninth, inclusive, in the settlement agreement, in accordance with the agreement of the parties expressed in the Eleventh paragraph of the agreement. In addition, the chancellor heard plaintiff testify that she understood the terms of the agreement and was satisfied with the terms, and that she understood that the clause that referred to the $3,000 item was not to be made a part of the decree. The attorney who represents plaintiff in the instant proceedings did not represent her in the divorce proceedings and it seems clear that the present claim is a mere afterthought and an attempt to enforce by contempt proceedings a mere contract between the parties, which, by their express agreement, was to form no part of the decree. The chancellor had, of course, statutory power to increase or decrease the weekly alimony payments in a proper proceeding, but the agreement in reference to the McCauley loan had nothing to do with alimony or support moneys.

Plaintiff argues that the decree in the divorce proceedings should be given a reasonable interpretation and that when the chancellor approved the agreement such approval was sufficient to merge the entire agreement in the decree even though that part of the agreement upon which plaintiff now relies was not embodied in the decree. It is a sufficient answer to this argument to say that when the chancellor approved the agreement he necessarily approved the Eleventh paragraph, and, as we have heretofore stated, when the chancellor became satisfied from plaintiff's testimony

to said decree," entered [illegible] things.

[illegible] defendant strenuously argues, it is difficult to [illegible] stand upon what theory [illegible] chancellor [illegible] the order in question. It is clear [illegible] from the decree [illegible] Seventh to Ninth, [illegible] accordance with [illegible] paragraph of [illegible] cellor [illegible] of the [illegible] reference [illegible] the parties, [illegible] no part of [illegible] statutory [illegible] payments in [illegible] ence to [illegible] support [illegible].

Plaintiff argues [illegible] ings should [illegible] when the chancellor approved the [illegible] was sufficient to merge the entire agreement in the decree even though that part of the agreement upon which plaintiff now relies was not embodied in the decree. It is a sufficient answer to this argument to say that when the chancellor approved the agreement he necessarily approved the Eleventh paragraph, and, as we have heretofore stated, when the chancellor became satisfied from plaintiff's testimony

that she understood the agreement and that only paragraphs First to Sixth, inclusive, should be incorporated in the decree, he entered the decree, which carried out the express agreement of the parties. Plaintiff's petition seeks not the enforcement of any part of the divorce decree, but asks for the entry of an order entirely unwarranted by the decree.

The chancellor erred in entering the judgment order and it is reversed and the cause is remanded with directions to the chancellor to dismiss plaintiff's petition.

JUDGMENT ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS
TO DISMISS PLAINTIFF'S PETITION.

Friend, P. J., and Sullivan, J., concur.

42807

GEORGE LOVERDE and VITO LOVERDE,
Appellants,

v.

CONSUMERS PETROLEUM COMPANY, a corporation,
Appellee.

) APPEAL FROM CIRCUIT COURT, COOK COUNTY.

327 Ill. 210

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs George Loverde and Vito Loverde are brothers. George Loverde owns a two-story frame building at 401 West Oak street (southwest corner of Oak and Sedgwick streets), Chicago, Illinois. There was a store on the first floor and a nine-room apartment on the second floor. Vito Loverde was the tenant of the store wherein he operated a grocery and market and Mrs. Bertha Lomax and her husband, who were colored people, were tenants of the second-floor apartment. Mrs. Lomax had ordered 200 gallons of oil from the Consumers Petroleum Company and, while the latter's agents were delivering same through a hose into tanks or drums in the front part of the basement, the oil or the fumes therefrom became ignited, causing a fire which resulted in extensive damage to George Loverde's building and to the merchandise, fixtures and equipment in Vito Loverde's store and that portion of the basement occupied by him. This action was brought by George Loverde and Vito Loverde against Consumers Petroleum Company to recover the damages claimed to have been sustained by them as the result of defendant's alleged negligence in delivering the oil. The case was tried by a jury which returned a verdict finding the defendant not guilty and judgment was entered on the verdict. Plaintiffs appeal.

Plaintiffs' complaint charged that defendant through its agents or servants was guilty of negligence in one or more of the following respects:

"(a) Carelessly and negligently handled and delivered said fuel oil in the basement of said premises, as aforesaid, and allowed the same to become ignited.

"(b) Carelessly and negligently used a lighted match which caused the fuel oil and fumes therefrom to become ignited.

"(c) Carelessly and negligently used a lighted cigarette in and upon said premises, as aforesaid, causing the fuel oil and fumes therefrom to become ignited."

Defendant's answer denied all of the allegations of negligence in the complaint. It is conceded that there was no evidence to support the charge that either of defendant's agents "used a lighted cigarette" while the oil was being delivered and it is also conceded that neither of the plaintiffs was guilty of contributory negligence.

The oil storage drums of Mrs. Lomax were located in the front part of the basement in a shed. This shed was in a storeroom allotted to her sole use. Her storeroom was partitioned or walled off from the rest of the basement. The only access to her storeroom and oil drums was by an outer stairway immediately alongside the east or Sedgwick side of the building. The steps proceeded downward toward the south and the entrance to her storeroom was at the bottom of the stairway. The opening in the sidewalk that afforded entrance to the stairway was covered by a trapdoor which was customarily closed and locked when the stairway was not in use.

Mrs. Bertha Lomax, the second floor tenant, testified that she had ordered 200 gallons of oil from defendant; that there were a lock and key to her storeroom in the basement and that she had the key; that the oil man came and rang her doorbell; that she came down and brought him the key to the basement; that he unlocked the basement door and went into the store-

room; that after he had unlocked and opened the basement door he went down with the hose to put in the oil; that at that time she was standing at the head of the steps; that there wasn't anybody else down there; that there were about eight steps from the sidewalk to the storeroom door; that "when he went down with the hose *** he put the hose down, so when he went down he strike the match"; that after she saw him strike the match "the flame said boo"; that he pulled the hose "out of the thing"; that "I said, 'there is a fire in the basement' *** they did not pay me no attention *** but that the men got to the head of the steps *** as I got back he had a blaze on the business of brass *** the nozzle *** he put that on the street and beat it off with his cap"; and that after he put out the fire on the nozzle "he flew *** I did not see him no more *** the truck drove away."

Mrs. Lomax testified on cross-examination that she went to the head of the steps and was looking in the basement; that she could see the man who lighted the match from where she was; that he was just at the bottom steps where the cans were and she saw him try to put the nozzle in the drums; that then he struck the match; and that there were two men on the oil truck but only one got off and went into the basement.

Plaintiff Vito Loverde testified that he was in his grocery store with his son and a clerk at the time of the fire; that Sam Abene and one or two other men were working near the south end of the building in question on the Sedgwick street side thereof applying brick-roll siding; that "except two people in the store, myself, Mrs. Lomax and the two men on the outside there was nobody around there"; that all of a sudden the lady who lived upstairs "hollered in the store and said fire down in the basement"; that his clerk ran out and

called the fire department; that when he came out on the sidewalk the man was putting out the fire on the hose with his cap; and that he put it out and then put the hose on the truck and went away.

He testified on cross-examination that he saw the man come out of the basement; that only one person came out; that he did not see a woman come out; that he was inside his store and did not know if Mrs. Lomax was in the basement; that he did not talk to the driver and helper on the oil truck - they drove away; that the first notice he had of the fire was when Mrs. Lomax came running in the door; that then he went out and saw the man coming from the basement with the hose and nozzle in his hands; and that he did not see another man come up out of the basement with him at the time.

Sam Abene testified that he saw the Consumers Oil truck when it arrived; that the driver pulled his hose down from the truck; that he saw him go into the basement to deliver some oil but that he did not notice anyone else go down with him; that nobody else came out of the basement with the man; that when the man come out his oil hose was in flames; that the minite he got to the sidewalk he banged the fire out with his cap, rolled up his hose and "beat it"; that he (Abene) and two other men were working on a scaffold on the side of the building about 35 feet south of "the trapdoor going down to the basement"; and that the men working with him did not go into the basement at any time.

He testified on cross-examination that he saw the driver of the truck going down alone into the basement; that the man on the oil truck put the hose under his arm and went right down the steps; that he was watching him all the time and did not see anyone else go down; that if anyone else went down into the basement he would have seen him; and that he

called the fire department; that [illegible] on the sidewalk the man was putting one the fire [illegible] cap; and that he put it on; and then put the hose on the truck and went away.

He testified on cross-examination that [illegible] man come out of the basement; that [illegible] that he did not see [illegible] where and did not know if [illegible] he did not [illegible] they drove away; that [illegible] when Mrs. Lomax came [illegible] out and saw the man [illegible] noticed in his hands; [illegible] up out of the basement with him [illegible].

[illegible] truck when it drove [illegible] from the crowd [illegible] some oil [illegible] that; that nobody [illegible] that when the man came [illegible] the middle [illegible] his cap, rolled up his [illegible] two other men were [illegible] building about [illegible] the basement"; and that [illegible] into the basement at any time.

He testified on cross-examination [illegible] driver of the truck going down alone into the basement; that the man on the oil truck put the hose under his arm and went right down the steps; that he was watching him all the time and did not see anyone else go down; that if anyone else went down into the basement he would have seen him; and that he

was not down there more than ten minutes.

Philip Buhle, who was the chauffeur of the oil truck and in charge thereof, testified on defendant's behalf that there might be 12 or 15 steps from the sidewalk to the bottom of the stairway leading to the storeroom entrance; that as you walk down the steps you go south; that you make a right turn at the bottom to get into the basement; that there is a door that closes off the basement from the building line; that after you open that door "you would have to go approximately eight or ten feet to reach the oil drums"; that there was no artificial light in the storeroom - electric light or gas; that this was an enclosed compartment which "he imagined was about eight by twelve feet"; that he had worked for the defendant for three years prior to the fire and had a helper on the truck whose name was Leroy Andrews; that about 2 P. M. on October 17, 1941 he drove up and stopped on the Sedgwick side of the building facing south opposite the trapdoor which was open; that the range oil they were delivering was "lighter than No. 1 and more like kerosene"; that they contacted the lady on the second floor and she contacted one of the fellows working on the side of the building who volunteered to go down to the basement and open the shed; that he, the helper and the man who volunteered went into the basement; that they were able to see the outlines of the drums; that he left the basement and the other two men remained there; that he went upstairs, opened the side doors of the truck, pulled out the hose and handed it to his helper who pulled it into the basement; that the hose was 150 long and always full of oil; that "one end, the value or gun, goes into the basement and the other end into the opening of the oil truck"; that he set the meter which was on the right side of the truck for 200 gallons and went to the other side of the truck and started the small motor; that he then went back again to the meter side and proceeded to write out the ticket

was not down there very long [illegible] minutes.

Philip Ruiko, who was the manager [illegible]
and in charge thereof, [illegible]
there might be 10 or 2 [illegible]
of the stairway [illegible]
walk down the stairs [illegible]
at the bottom to get into the basement, [illegible]
that closes off the one [illegible]
door open that [illegible]
on top to break the [illegible]
light in the basement - [illegible]
unknown compartment which [illegible]
death; that he had worked for the [illegible]
to the time he had a helper on the [illegible]
in new; that [illegible]
dropped on the sidewalk [illegible]
into the truck [illegible]
delivering the [illegible]
they contacted the body of the [illegible]
one of the 2 [illegible]
volunteered to go [illegible]
he, the helper and the [illegible]
that they were able to [illegible]
the basement and [illegible]
windows, opened the side door of the truck, pulled out the hose
and handed it to his helper who pulled it into the basement; that
the hose was 150 long and was full of oil; that [illegible] the
valve or [illegible] goes into the basement and the other one into the
opening of the oil truck; that he set the motor which was on the
right side of the truck for 200 gallons and went to the other side
of the truck and started the small motor; that he then went back
again to the motor side and proceeded to write out the ticket

for the delivery and the meter stopped at 17 gallons; that before he had a chance to walk over to the stairway opening the helper and the other fellow came running out and "hollered fire"; that the helper carried up the hose; that it was still burning on the end; that they put the fire out with their caps; that the other fellow ran into the store to call the fire department; that they wound up the hose on the reel, pulled up about half a block out of the way of the fire department, waited for probably half an hour and then finished their deliveries; and that Mrs. Lomax was nowhere in sight but that after the fire started he saw her "running around like the rest of the people in a fire."

Leroy M. Andrews, the helper on defendant's oil truck, testified on defendant's behalf by deposition that "the old fellow - the carpenter or whatever he was - showed them where to put the oil"; that they had two flashlights on the truck but that he did not take either of them into the basement; that "the old fellow had a candle in his hand and asked him if he wanted more light"; that the oil was lighted when this same old fellow, the carpenter, tried to light the candle; that "it happened just all of a sudden *** this gas was ignited *** I did not have much time to think of anything."

He testified on cross-examination that he was 22 years old and had worked two months on the oil truck; that he saw "the glare of a match - he [the old fellow] did not light the candle, he just started to"; that the explosion occurred as soon as the match was lighted - "you can tell how they pop as they strike"; that the fire blew right up in front of his face; that he pulled out the hose and went upstairs; that he noticed the fire was still coming out of the nozzle of the hose and they put it out; that he saw the premises burning; and that the fire department arrived before they left but that

they did not talk to any of the firemen at that time.

All but one of plaintiffs' contentions have to do with claimed prejudicial error in the giving of instructions tendered by defendant. The only point concerning instructions urged in plaintiffs' written motion for a new trial was: "The court erred in giving each of the instructions tendered by the defendant and given by the court." When plaintiffs' attorney argued their motion for a new trial, Instruction No. 20 was the only instruction he alluded to or criticized. When he had completed his argument as to that instruction the following occurred:

"Mr. Farrell [defendant's attorney]: Is that the only instruction you are arguing about? I could not tell from your motion for a new trial. That is the only instruction?

"Mr. Neale [plaintiffs' attorney]: That is the only one I am complaining about."

In view of the specific statement by plaintiffs' attorney to the trial court that Instruction No. 20 was the only one he was complaining about, they are precluded from urging error in this court as to the giving of any of the other instructions.

We will now consider plaintiffs' contention that the trial court erred in giving to the jury defendant's requested Instruction No. 20, which is as follows:

"The Court instructs the jury that the defendant cannot be held liable to the plaintiffs for any act of negligence not committed by the defendant's agent, and the Court further instructs you that if you believe from the evidence that the damage was caused by some third party who was not an agent or servant of the defendant, then you should find the defendant not guilty."

In our opinion Instruction No. 20 was misleading and prejudicial and, since it directed a verdict, it was not cured by any other instruction in the series of instructions. Although it was a controverted question of fact for the jury to determine as to whether or not there was a third party

they did not testify to any of the elements of the tort.

All but one of plaintiff's contentions have to do with claimed prejudicial error [illegible] tendered by defendant. The only other contention plaintiff urged in plaintiff's motion [illegible] court erred in giving [illegible] defendant no cause [illegible] argued their motion [illegible] the only instruction [illegible] completely his approval [illegible] statement:

"[illegible] only instruction [illegible] you [illegible]

"[illegible] [illegible]

[illegible] defendant to [illegible] only [illegible] [illegible] other instructions.

[illegible] [illegible] instruction [illegible]

"The court [illegible] cannot be held liable [illegible] negligence not [illegible] court further instructs you [illegible] evidence that the [illegible] was not an agent or servant of the [illegible] find the defendant not guilty."

In our opinion the instruction [illegible] misleading and prejudicial and, since it directed a verdict, it was not cured by any other instruction in the series of instructions. Although it was a controverted question of fact for the jury to determine as to whether or not there was a third party

in the basement when the fire started, this instruction assumed not only that there was but that he lighted a match that caused the fire.

Furthermore this instruction ignored and excluded from the consideration of the jury other facts and circumstances in evidence which might properly have been found to constitute negligence on the part of defendant's agent, which alone or in cooperation with the act of the third party caused the damage suffered by plaintiffs. Negligence is not only the doing of something which a prudent and reasonable man would not do but it is also the omission to do something, which a prudent and reasonable man guided by those considerations which ordinarily regulate human affairs, would do and the rule is well settled "that a person contributing to a tort, whether his fellow contributors are men, natural or other forces, or things, is responsible for the whole, the same as though he had done all without help." (St. Louis Bridge Co. v. Miller, 138 Ill. 465.)

The only occurrence witness who testified on defendant's behalf was the helper, Leroy Andrews, and that portion of his testimony pertaining to the cause of the fire as as follows: "Q. Can you state what caused the starting of the fire? A. Yes, I am sure that he tried to light the candle. Q. He had a candle in his hand? A. Yes, when he asked me if I wanted more light. Q. What was the first occasion you had to know that there was a fire or an explosion? A. Well, it happened just all of a sudden. This gas was ignited, I guess you would call it. I didn't have much time to think of anything. Q. Do you know what did occasion the lighting of the oil? A. Yes, when he tried to light the candle. Q. And who do you refer to when you say, 'he turned to light the candle'? A. The same old fellow; the carpenter." (Italics ours.)

He testified on cross-examination as follows:

[illegible]

[illegible]

He testified on cross-examination as follows:

Q. Did you actually see anyone light a candle? A. Yes, the glare of a match - and he didn't light the candle, he just started to. Q. And the explosion occurred as soon as the match was lighted? A. Yes, you can tell how they pop as they strike. Q. And you know that the explosion immediately followed the match that was lit by somebody else? A. Yes."

It was the duty of defendant through its agents to use ordinary care in the delivery of the oil and they were bound to use caution commensurate with the known danger. The record discloses beyond question that the oil was volatile and inflammable and Andrews testified that he knew that it was dangerous when same was being delivered into the drums to expose it or its fumes to a lighted cigarette or the flame of a lighted match. Andrews, knowing as he did, the dangerous consequences that would in all likelihood ensue if the oil or its fumes were exposed to or came in contact with the flame of a lighted match, remained silent, in so far as the record discloses, when the so-called old fellow, with a candle in his hand, asked him if he "wanted more light." According to Andrews the ignition and explosion of the oil and its fumes followed "all of a sudden" upon the lighting of the match but he did not testify that the match was lighted at the same time the old fellow asked him if he wanted more light.

The basement in which the oil was being delivered was dark and Andrews was in charge of such delivery. When Andrews was asked by the old fellow if he wanted more light the old fellow undoubtedly thought that he needed more light. Andrews saw the candle in the old fellow's hand, heard his question and the question should have indicated to him the possibility at least that the old fellow might attempt to light the candle if he was not warned not to do so. The situation presented

9. Did you seen Lil [illegible] Alice's [illegible] the place of a match - [illegible] just started to. [illegible] the match was lighted? [illegible] as they stroke. 9. [illegible] totally followed by [illegible] was."

It was [illegible] to use matches [illegible] bound to use a match [illegible] record [illegible] dangerous when a [illegible] choose if or the fumes [illegible] of a lighted match. [illegible] no consequence [illegible] his fumes were [illegible] a lighted match, [illegible] choose, [illegible] hand, [illegible] achieves the [illegible] followed "fall of [illegible] he did not [illegible] the old fellow asked him if he wanted [illegible] light.

The [illegible] dark and [illegible] was [illegible] was asked by the old fellow if he wanted more light the old fellow undoubtedly thought that he needed more light, [illegible] saw the candle in the old fellow's hand, heard his question and the question should have [illegible] to him the possibility at least that the old fellow might attempt to light the candle if he was not warned not to do so. The attention presented

by Andrews' testimony was not that the old fellow, unheard and unseen by him and without notice to him, lighted the match. The old fellow must have been fairly close to Andrews in order for the latter to have seen the candle in his hand in the dark basement and it necessarily follows that if he could see the candle in the old fellow's hand before he lit the match, he could also see the old fellow himself at that time. It was Andrews' positive duty, having heard the old fellow's question and having at the same time seen the candle in his hand, to have instantly warned him not to light a match or the candle, if he had the time and opportunity to do so before the match was lighted. It was a fair question for the jury to determine from the testimony of defendant's servant, Andrews, heretofore set forth and discussed, and the attendant circumstances, whether the defendant was guilty of negligence which alone or in combination or cooperation with the conduct of the old fellow third party, was the proximate cause of the fire.

It has been repeatedly held that where a case is close on the facts and the issues involved therein must be determined upon conflicting evidence, the jury must be accurately instructed. We are impelled to hold that the proposition contained in the instruction under consideration that plaintiffs could not recover if their damage was caused by a third party who was not an agent of defendant, when applied to the evidence before the jury, was clearly misleading and erroneous.

Plaintiffs also contend that the verdict of the jury was against the manifest weight of the evidence. Since the evidence was conflicting and a fair question of fact was raised by the proof, we would not be warranted in disturbing the verdict of the jury on the ground that it was against the manifest weight of the evidence.

For the reasons stated herein the judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

Friend, P. J., and Scanlan, J., concur.

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|---|---|---|
| BESSIE SIMON, Appellant, | ) | |
| v. | ) | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |
| PAULA BALASIC and ALFRED BALASIC, Appellees. | ) | |



MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Bessie Simon, for the alleged conversion by defendants, Paula Balasic and Alfred Balasic, of household furniture and furnishings and other personal property belonging to plaintiff. Upon a trial by the court without a jury defendants were found not guilty and judgment was entered in their favor. Plaintiff appeals from such judgment.

The statement of claim alleged that on March 29, 1940 defendants were "in possession of the plaintiff's goods"; that on said date plaintiff made a written demand upon defendants for her goods; that her demand was refused; that defendants converted her property to their own use; and that the reasonable value of said property was $500. Included in the statement of claim was a list of the property claimed to have been converted. Defendants' statement of defense denied that they were guilty of converting any of plaintiff's personal property.

It appeared that defendants purchased from plaintiff for $2100 cash all of the furniture and furnishings in the 52-room building at 55 West Erie street, Chicago, which building had been theretofore operated by Bessie Simon as the Calumet Hotel, as well as her leasehold interest and the good will of her hotel business. Attached to the bill of sale executed by plaintiff and

4359?

MERRIE SIMON,
Appellant,

v.

MAGNA MAGNIS and
[illegible]
Appellees.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

This action was [illegible]
for the alleged conversion [illegible]
and lifted chairs, or [illegible]
and other personal [illegible]
a trial by the court without [illegible]
not guilty and [illegible]
Plaintiff's [illegible] appeal.

The abstract of [illegible]
determinate more [illegible] conversion of the [illegible]
that on a [illegible]
determinate [illegible]
that the [illegible]
and that the [illegible]
included in the [illegible]
property claimed [illegible]
attachment of [illegible]
convertible [illegible]

It appears that [illegible] purchased [illegible]
for $2100 cash all of the furniture [illegible] in
the 52-room building at 57 West [illegible] street, which
which building had been theretofore [illegible] by Merrie
Simon as the Oakmont Hotel, as well as her leasehold
interest and the good will of her hotel business.
Attached to the bill of sale executed by plaintiff and

delivered to defendants on February 27, 1940 was an inventory of the furniture and furnishings in the hotel which were included in the sale. None of the personal property involved herein was listed in said inventory. It also appeared that within a few days after defendants took possession of the hotel premises plaintiff removed her personal possessions from that portion of the hotel formerly occupied by her as living quarters and that Ben Goldberg, who had managed the hotel for plaintiff, removed some barrels and boxes containing dishes belonging to one Fred Goldberg from a basement storeroom on March 1, 1940.

Ben Goldberg testified that the household furniture and furnishings of plaintiff involved herein were in three or four storerooms and a three-room apartment in the basement of the hotel; that these storerooms and the three-room apartment were locked and plaintiff retained possession of the keys; that he inventoried plaintiff's property in the storerooms and three-room apartment on February 26, 1940; that on or about March 2, 1940 he and Mrs. Simon went to the hotel premises with an expressman and a truck to move her belongings and the defendant Alfred Balasic refused to permit them to do so; that on March 29, 1940, as plaintiff's agent, he served a written demand on defendants for the delivery of Mrs. Simon's property as listed in such demand, such list having been compiled from the inventory theretofore made by Goldberg; and that Alfred Balasic refused to comply with the demand.

Both Bessie Simon and Ben Goldberg testified in substance that in June 1940, when this case first appeared on the call in the Municipal court, all the parties and their attorneys met in the corridor outside of the court room;

delivered to defendants on [illegible] 1, 1940 in an inventory of the furniture and furnishings in the hotel which were included in the sale. None of the personal property involved herein was either in said inventory, [illegible] appeared that within a few days, [illegible] defendants took possession of the hotel premises [illegible] personal possessions from the premises. [illegible] forcibly occupied [illegible] the hotel premises [illegible] Dollberg, who had [illegible] of [illegible], removed some burnels and [illegible] to one Fred Dollberg, the [illegible] Dollberg.

Don Dollberg [illegible] and furnishings [illegible] or four adjoining [illegible] ent of the hotel; that [illegible] apartment was located [illegible] the upper [illegible] storerooms [illegible] that on or about [illegible] the hotel premises [illegible] her belongings and [illegible] permit them to do so; that [illegible] agent, he served a written demand [illegible] for the delivery of the [illegible] property, as listed in said demand, such list having been supplied from the inventory theretofore made by Goldberg; and that [illegible] to comply with the demand.

Both Bessie Dixon and Don Dollberg testified in substance that in June 1940, when this case first appeared on the call in the Municipal court, all the parties and their attorneys met in the corridor outside of the court room;

that Ben Goldberg was present at said meeting; that at that time defendants and their attorney went over the itemized list of household articles included in plaintiff's statement of claim and in the written demand and checked off on said list the items belonging to plaintiff that were still in the hotel and those which were not; that defendants and their attorney then admitted that all of the articles listed, with a few exceptions, were still at the hotel and told plaintiff that she might remove same; that plaintiff agreed that she would be satisfied to take her household belongings indicated on the list by defendants as being still in the hotel; that on the same afternoon plaintiff and Ben Goldberg went to the hotel with an expressman and a truck to remove her belongings; that Alfred Balasic insisted that before he would allow them to go down into the basement "to remove that stuff, you will have to sign this paper here that you have nothing else in the building"; that Mrs. Simon told him she would not sign the paper until she saw and removed her property; that Balasic then accompanied them to the basement and pointing to a pile of rubbish in the center of the basement floor said, "There it is *** take it"; that plaintiff protested that her household goods were not in the rubbish pile but in the storerooms; and that Balasic said, "You have nothing in the storerooms *** this is what you asked for and this is what you will get." Plaintiff refused to accept any of the "rubbish" as her property. Ben Goldberg testified that the reasonable value of the property in question was $408.75 and plaintiff testified that it was $463.50.

Defendant Alfred Balasic testified that plaintiff's written demand for the delivery to her of the personal property involved herein was served upon him March 29,

1940; and that at the meeting of the parties and their attorneys in June 1940, after this suit had been instituted, he admitted that all of the articles of household furniture belonging to plaintiff, with a few exceptions, were still in the hotel and that he stated at that time that he would turn such articles over to her if she called for them. He denied that any demand was made on him by plaintiff or anyone in her behalf for the delivery of this property prior to June 1940, except the written demand of March 29, 1940. He testified to substantially the same effect as Goldberg and Mrs. Simon as to what occurred on the occasion when they went to the hotel in June 1940 to remove plaintiff's property after he had admitted at the conference in the City Hall, heretofore referred to, between the parties and their attorneys that said property was still in the hotel and that she might have it if she called for it. At a previous trial of this case he denied that plaintiff or anyone in her behalf came to the hotel for her property after his admission in June 1940 that he still had it in the hotel. According to the testimony of Balasic the pile of rubbish which he finally offered to plaintiff in June 1940 as her property was worthless junk, "was never in the storerooms to my knowledge," and he did not know where the "stuff" was before February 27, 1940, when he and his mother purchased the furniture and furnishings of the hotel from plaintiff.

Defendants produced as a witness one Emil Erkalie, who had been the furnaceman and houseman at the hotel prior to defendants' purchase thereof and for a short time thereafter. He testified that all of the storerooms and the three-room apartment were filled with furniture and other household

1940; and that at the meeting of the parties and their attorneys in June 1940, [illegible] the [illegible] furnished [illegible] furniture belonging to plaintiff, which [illegible] were still in and [illegible] that she [illegible] that he would [illegible] for them. [illegible] plaintiff or anyone in her [illegible] property prior to [illegible] March 24, 1940. [illegible] effect as follows: [illegible] the occasion when [illegible] remove furniture [illegible] controversy [illegible] between the parties [illegible] was still in [illegible] called for it. [illegible] that plaintiff or anyone [illegible] her property after [illegible] in the hotel. [illegible] the pile of [illegible] since 1940 on her property [illegible] in the storerooms [illegible] where the "junk" was [illegible] and his mother purchased [illegible] the hotel from plaintiff.

Defendants produced [illegible] witness one [illegible], who had been the janitor-man and handyman at the hotel prior to defendants' purchase thereof and for a short time thereafter. He testified that all of the storerooms and the three-room apartment were filled with furniture and other household

belongings at the time the Balasics purchased the hotel; that Ben Goldberg moved everything out of the three-room apartment and all of the storerooms except one on March 1, 1940; that the contents of the storerooms were loaded on a ten-ton furniture van and a smaller truck; that it required about four hours - from 8:00 A. M. to shortly before noon - to load the larger truck and four hours - from 6:00 P. M. to 10:00 P. M. - to load the smaller truck; that both trucks were loaded in front of the hotel; that he helped to load them; and that all the articles that would fit through the front door of the hotel and the front basement windows were carried out that way.

The defendant Paula Balasic testified that she did not convert to her own use any property that was listed in the demand served upon her and that she did not authorize anyone to take any of the property listed in the demand. This evidence was objected to and should have been excluded.

Three other witnesses testified in defendants' behalf, Otto Fenska, Martha Muhlenfeld and Frank Colugi. Fenska was a secondhand furniture dealer and he testified that the junk which Balasic offered plaintiff as her property had no value. Martha Muhlenfeld was the broker who negotiated the sale of the hotel to the Balasics and her testimony was entirely immaterial. It was merely to the effect that in connection with the sale of the hotel to the defendants the only articles that she inventoried in the basement were three mattresses and a gas range which were not in any of the storerooms. She testified on the instant trial that she went into one storeroom but on a previous trial of this case she testified that she did not go into any of the storerooms or the three-room basement apartment when

belongings at the time the building [illegible]
that Ken Goldfarb moved everything out of the three-room
apartment and all of the storerooms [illegible]
1940; that the contents of the [illegible] on [illegible]
a ten-ton truckload [illegible]
placed about [illegible]
noon - to [illegible]
2. to 11:00 [illegible]
Dorothy was [illegible]
load them on [illegible]
the front door of the [illegible]
who carried out [illegible]

The [illegible] was [illegible]
convert to her own use [illegible]
demand several [illegible]
to take any [illegible]
evidence was objected to [illegible]

There other witnesses [illegible]
Otto Gomsin, [illegible]
was a [illegible]
the truck which [illegible]
had no [illegible]
tinted the walls of the [illegible]
now was [illegible]
that in connection with [illegible]
ents the only exhibits [illegible]
were three witnesses and a [illegible] range with [illegible] in [illegible]
of the storerooms. The testified on the [illegible]
that she went into one storeroom but on a previous trial
of this case she testified that she did not go into any of
the storerooms or the three-room basement apartment when

she was taking the sale inventory. Colugi's testimony was immaterial in that it did not have the slightest bearing on the issue of the conversion of the property.

On rebuttal Ben Goldberg denied that he moved the contents of the storerooms and the three-room basement apartment on two trucks on March 1, 1940, as stated by Erkalie, or at any other time.

The evidence offered on plaintiff's behalf, coupled with the admission of defendants and their attorney in June 1940 that the items of personal property belonging to plaintiff and listed in her statement of claim and written demand, with a few exceptions, were still in the hotel, is conclusive against the defendants. Balasic testified that he and his attorney made this admission and there was nothing casual or indefinite about it. It was deliberately made and he further admitted that he invited plaintiff to go to the hotel and get her property. In thepresence of all the parties and their attorneys he was asked by his own lawyer whether or not the items listed were still in the hotel and it was only when he stated that they were that they were checked off on the lists as being there. He certainly must have previously seen and examined the articles listed on the written demand before he would deliberately admit that they were on the hotel premises. His admission was not that the property of plaintiff which he had in his possession and was willing to deliver to her was the pile of junk which he thereafter proferred to her but that the items of plaintiff's property enumerated on the statement of claim and written demand, with a few exceptions, were still at the hotel and that she might have them by calling for them. While the

she was taking the only favorable. [illegible] was immaterial [illegible] it did not [illegible] bearing on the issue of the possession of the property.

In rebuttal [illegible] defendant denied the contents of the [illegible] and the three [illegible] department on two breaks on [illegible] Hill, [illegible] Kimmelie, or at any other time.

The evidence [illegible] with the defendant [illegible] time light that the [illegible] to [illegible] mattress [illegible] the hotel, in [illegible] testified [illegible] there was nothing [illegible] different [illegible] plaintiff [illegible] the presence of all the [illegible] naked by his own [illegible] were still in the hotel [illegible] that they were [illegible] being there. [illegible] examined the articles listed on the [illegible] he would deliberately state that they were on the hotel premises. His admission was not that the property of plaintiff which he had in his possession [illegible] to deliver to her was the pile of junk which he thereafter proferred to her but that the items of plaintiff's property enumerated on the statement of claim and mattress demand, with a few exceptions, were still in the hotel and that she might have them by calling for them. While the

items on those lists were secondhand, none of them was described as being junk and when Balasic made the admission in the presence of his attorney and with his advice, neither he nor his attorney suggested or intimated that all or any of them were worthless junk. On a previous trial of this case Alfred Balasic testified that, after he had admitted that plaintiff's property was in the hotel and that he had offered to turn it over to her, she did not come to the hotel to remove it or take any steps to have it removed. On the trial which resulted in the judgment from which this appeal was taken Balasic changed his testimony and stated that Mrs. Simon and Goldberg did go to the hotel in June 1940 to remove her property after he had admitted that it was still there. It was on that occasion that he offered her the pile of worthless junk as her property and before he even showed it to her he fraudulently endeavored to get her to sign a statement to the effect that she had received her property and had "nothing else in the building."

The fantastic testimony of the houseman Erkalie does not merit serious consideration, since it is entirely inconsistent with and contradicted by Balasic's testimony. He testified that Goldberg removed all of plaintiff's furniture and furnishings from the storerooms and three-room apartment on March 1, 1940 and moved them away on two large trucks, which he helped to load. Balasic testified that plaintiff's property was still in the hotel in June 1940. Balasic testified that he did not know what property was removed from the storerooms during the period of three or four days after he bought the hotel on February 27, 1940 because he was never in the basement but the houseman testified that

the two trucks were directly in front of the hotel being loaded for an aggregate of eight hours on March 1, 1940 and that many of the articles were carried out to the trucks through the front door of the hotel. Under all the circumstances testified to by Erkalie, Balasic, who was in the hotel on March 1, 1940, must have seen and known that all of plaintiff's belongings were moved away from the storerooms on that day, if they were so moved, even though he did not go near the basement. When it is considered that plaintiff claimed and testified that all of her property was in the storerooms and that defendant admitted in June 1940 that practically all of it was still in the hotel he must, as already stated, have seen and examined such property to have made that admission. That the pile of junk that Balasic offered to turn over to plaintiff did not constitute any of her property we think is conclusively shown by his testimony that such pile of junk "was never in the storerooms to my knowledge," and that he did not know where the "stuff" was before February 27, 1940. It is certain from all the evidence that the pile of junk was not on the basement floor on the day defendants took possession of the premises.

There was no evidence presented by defendants that constituted even a semblance of a defense to plaintiff's claim and the evidence heretofore set forth and our analysis of same show clearly and conclusively that plaintiff had a meritorious claim. We are impelled to hold that the judgment of the trial court is against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is reversed. Judgment is entered here for $408.75 against the defendants.

JUDGMENT REVERSED AND JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

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|---|---|
| ILLINOIS DEVELOPMENT CORPORATION, a corporation, Appellee, | INTERLOCUTORY APPEAL |
| v. | FROM CIRCUIT COURT, |
| JOHN W. WUERTH, President of Board Trustees of Skokie; THEODORE HEINZ, Chief of Police, and THOMAS McMULLEN, Health Enforcing Officer of said Village of Skokie, Appellants. | COOK COUNTY. |

78

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Illinois Development Corporation, filed a complaint for injunction on June 28, 1945 against the defendants, John W. Wuerth, President of the Board of Trustees of the Village of Skokie and Theodore Heinz, Chief of Police, and Thomas McMullen, Health Officer of said village. On the following day, June 29, 1945, on plaintiff's motion an order was entered granting it a temporary injunction against the defendants without notice and without bond and pursuant to said order a writ of injunction issued. By this appeal defendants seek the reversal of the order granting the temporary injunction and the dissolution of the writ of injunction. While the record presented to this court contains defendants' verified answer and plaintiff's reply thereto in addition to plaintiff's complaint, the propriety of the order for the issuance of the temporary injunction must necessarily be determined solely on the allegations of plaintiff's verified complaint, which was the only pleading before the trial court when said order was entered.

The verified complaint alleged substantially that plaintiff is the owner of a valuable tract of land located at approximately 3500 West Touhy avenue, in the Village of Skokie, Cook County, Illinois; that this land is situated

more than two miles from the business and residential sections of said village; that plaintiff has erected and operates a loading platform on said premises which is used exclusively for the purpose of unloading thereon dirt, cinders, ashes, rubbish and miscellaneous refuse collected from the 14 northwest wards of the city of Chicago and hauled to such loading platform by trucks belonging to the city of Chicago; that the aforesaid ashes, rubbish and other waste material are removed daily from the loading platform by rail to Pullman, Illinois, for permanent disposal; that said loading platform on the premises in question and one on land immediately adjacent thereto have been in use and operation for the same purpose for more than 10 years; that plaintiff regularly enters into contracts with the city of Chicago under the terms of which the city is privileged and licensed to use said loading platform and that such a contract was in force during the period involved herein and still is in force; that the use of the premises for a loading platform does not and will not cause or result in "noxious odors," is not dangerous to health and "is for an entirely lawful and proper purpose"; that plaintiff has "a substantial financial investment in real estate, labor, roads, runways, tractor, hose, office building and other equipment in and about the said premises"; that "two police of said Village of Skokie under the command and supervision of the defendants, John W. Wuerth and Theodore Heinz, did on, to-wit, May 9, 1945, without any warrant of law or any justification whatsoever, wrongfully interfere with, obstruct and prevent the placing upon the loading platform on said premises for purpose of transfer onto railroad cars for shipment dirt, cinders, ashes, rubbish, and miscellaneous refuse of the nature herein described, and did inform the agent and employees of the

more than two miles from [illegible] of said Village [illegible] loading platform on [illegible] for the purpose of [illegible] [illegible] 14 north[illegible] west [illegible] [illegible] "northern [illegible] [illegible] not permanent [illegible] "premises [illegible] thereto [illegible] for more than [illegible] contracts [illegible] the [illegible] and that [illegible] herein and [illegible] a loading platform [illegible] "noxious odors," [illegible] entirely lawful [illegible] substantial [illegible] runways, tractors, [illegible] in and about the said premises; [illegible] of said Village of Skokie [illegible] of the defendants, John [illegible] and Theodore [illegible], did on, to-wit, May 9, 1945, without any warrant of law or [illegible] justification whatsoever, wrongfully interfere with, obstruct and prevent the placing upon the loading platform on said premises for purposes of transfer onto railroad cars for shipment dirt, cinders, ashes, rubbish, and miscellaneous refuse of the nature herein described, and did inform the agent and employees of the

City of Chicago that they, the said Police Officers, and the defendants, John W. Wuerth, and Theodore Heinz, would not permit and did prevent and stop the entering upon said premises for the purpose of placing thereon dirt, cinders, ashes, rubbish and miscellaneous refuse for transfer onto railroad cars for shipment, and did then and there arrest two agents and employees of the City of Chicago, and have threatened to arrest other of the employees and agents of the City of Chicago should they thereafter drive any truck of the said City of Chicago upon said premises for the purpose of placing dirt, cinders, ashes, rubbish and miscellaneous refuse for transfer onto railroad cars for shipment"; that "no crime or breach of the peace or violation of law" had been or was being committed by the plaintiff or any employee of the city of Chicago; that the defendants "are now interfering as hereinabove stated with the performance by the plaintiff of its contract, rendering it impossible for the plaintiff to use said premises for the lawful and proper purposes aforesaid; and by reason thereof the plaintiff will lose large sums of money, will lose its rights and profits under and by virtue of said contract, the value of its interest in said premises will be materially diminished, and plaintiff will suffer irreparable harm and damage, for which plaintiff has no adequate, full and complete remedy at law; that if a temporary injunction is not issued by this Honorable Court forthwith, without notice and without bond, the rights of the plaintiff will be seriously and adversely affected and prejudiced through the unlawful conduct and interference of the defendants as hereinabove set forth."

The complaint concluded with a prayer for the issuance of a temporary injunction without notice and without bond pending the final hearing of the cause and that thereafter a perma-

ment injunction be ordered to issue restraining defendants "from in any manner interferring, obstructing, or preventing the plaintiff, personally or through any of its agents, employees, or the City of Chicago, or any of its agents or employees from using said premises for the placing thereon of dirt, cinders, ashes, rubbish and miscellaneous refuse for transfer onto railroad cars for shipment."

The injunctional order after finding that "proper and immediate cause exists" for the issuance of a temporary injunction "without notice" and that "good cause has been shown" for the issuance of such injunction "without bond," directed that the defendants be "restrained and enjoined, during the pendency of this cause" in accordance with plaintiff's prayer for relief.

Defendants contend that "notice of time and place of application for injunction is an essential condition precedent to its issuance in the absence of an adequate showing in the complaint or affidavit that the rights of the plaintiff would be unduly prejudiced if notice was not waived."

Section 3 of the Injunctions Act (sec. 3, chap. 69, Ill. Rev. Stat. 1943) provides as follows:

"No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice."

We have carefully examined the allegations of plaintiff's complaint and affidavit and find no facts alleged therein that warranted the chancellor in ordering the temporary injunction to issue without notice. The defendants are officers of the Village of Skokie which is just outside the city limits of Chicago and there can be no question but that they could have been conveniently served. It is difficult to perceive from

[illegible] injunction be ordered to issue [illegible] from an [illegible] the plaintiff, [illegible] employees, or the [illegible] employees from [illegible] of dirt, [illegible] for transfer [illegible]

The [illegible] and immediate [illegible] injunction [illegible] for the issuance [illegible] that the [illegible] pendency of this [illegible] for relief.

[illegible]

[illegible] complaint [illegible]

[illegible]

[illegible] Tenn. [illegible] 1911. [illegible] follows:

"The court [illegible] motions [illegible] been given to the [illegible] the defendants [illegible] the complaint or [illegible] injunction is not [illegible]

We have [illegible] the [illegible] of plaintiff's complaint and [illegible] that warranted the chancellor in ordering the temporary injunction to issue without notice. The defendants are officers of the Village of Skokie which is just outside the city limits of Chicago and there can be no question but that they could have been conveniently served. It is difficult to perceive from

the facts alleged in the complaint how plaintiff could possibly have been unduly prejudiced or how it could have suffered irreparable damage if it had served notice on defendants of its intended application for the temporary injunction.

In a feeble attempt to sustain the order directing the issuance of the temporary injunction without notice plaintiff makes the following statement in its brief:

"The court will take judicial notice that June 29, 1945, the date of the entry of the temporary injunction order in the Circuit Court, was on a Friday and that it was the last full day of the term of court before the summer vacation. In order to present the application for injunction before the judge to whom the case was assigned it was necessary to immediately present the same on the day following the filing of the complaint, allowing no time for the service of notice upon the three defendants residing in the suburb of the City of Chicago. The emergency judge heard motions on the following Tuesday, and from experience an emergency judge frequently does not have sufficient time during a crowded court day to hear the presentation of an application for temporary injunction. Had notice been given, plaintiff had every reason to believe that the defendants would have persisted in their unlawful acts and conduct upon a much larger scale."

The reasons advanced by plaintiff in the foregoing statement to justify the issuance of the injunction without notice are inadequate and unsound. As soon as plaintiff filed its complaint it knew what judge's call the case was assigned to. The complaint was filed on June 28, 1945 and no good reason is shown as to why plaintiff did not have ample time on that day to serve defendants with notice that it was going to apply for the injunction on the morning of the following day, June 29, 1945, even though that "was the last full day

of the term before the summer vacation." It is idle for plaintiff to urge that it had no time under the circumstances "for the service of notice upon the three defendants residing in the suburb of the city of Chicago." Defendants were just as available for service of notice on June 28, 1945 as was the office of the clerk of the court for the filing of the complaint on that day. Valid service could have been had on defendants at any time prior to 4 P. M. on June 28, 1945, notifying them that plaintiff was going to apply for the injunction at 10 A.M. on June 29, 1945. The facts alleged in the complaint do not tend to show that plaintiff would have been unduly prejudiced or irreparably damaged between the afternoon of June 28, 1945 and 10 A.M. the next day, if it had given defendants notice of its application for the injunction. It is only necessary to say regarding the reference made in the foregoing quoted statement of plaintiff as to emergency judges that ordinarily an application for a temporary injunction is an emergency matter and the primary function of judges sitting during the summer vacation is to hear all emergency matters presented to them.

While the complaint in the ninth paragraph thereof contains some allegations by way of conclusions concerning arrests and threats of arrests by defendants or their agents, the only specific allegation therein relating to arrests or threats of arrests was that "on, to-wit, May 9, 1945" defendants caused to be arrested two truck drivers of the city of Chicago and threatened to arrest others and to prevent further unloading on the platform by the employees of the City of Chicago. The complaint is silent as to what transpired in connection with the loading platform and deliveries thereto from on or about May 9, 1945, when the arrests and specific

of the term before the summer vacation. [illegible] for plaintiff to urge that it had no time under the statutes "for the service of notice upon the [illegible] to [illegible] in the absence of the city of [illegible] as available for service of notice on [illegible] the office of the [illegible] complaint on the [illegible] defendants at any time [illegible] notifying them that [illegible] injunction [illegible] the complaint do not tend to show that [illegible] been unduly prejudiced [illegible] afternoon of June [illegible] had given [illegible] injunction. It is only [illegible] made in the foregoing [illegible] counsel judge [illegible] injunction is [illegible] judge sitting [illegible] emergency [illegible] to them.

While the complaint in the [illegible] contains some allegations [illegible] concrete and threats of [illegible] the only specific allegation therein relating to [illegible] chunks of concrete was that on [illegible] [illegible] caused to be directed the truck drivers of the city of Chicago and threatened to arrest others and to prevent further unloading on the platform by the employees of the city of Chicago. The complaint is silent as to what transpired in connection with the loading platform and deliveries thereto from on or about May 2, 1945, when the arrests and specific

threats were made, until June 28, 1945, when the complaint was filed. It is difficult to understand and there is nothing in the complaint that explains why, if plaintiff's rights were illegally interfered with on or about May 9, 1945, it delayed filing its complaint until June 28, 1945, a date which, according to it, did not allow sufficient time to serve defendants with notice.

The rule governing the issuance of an injunction without notice is clearly stated in Brin v. Craig, 135 Ill. App. 301, where the court said at p. 306:

> "This Court has spoken many times in no uncertain voice in condemnation of the practice of granting an injunction without notice unless it is made clearly and indisputably to appear from the facts recited and verified, that the rights of a complainant will be unduly prejudiced unless the same be granted without notice. No presumptions are to be indulged in favor of action without notice, but parties must, on facts stated and sworn to, bring themselves within the exception of the statute before being entitled to an injunction without notice. Failing to do so, an injunction granted will be held to be improvident and dissolved."

All that need be said of the finding of the trial court in the injunctional order that "good cause has been shown for the issuance of said temporary injunction without bond" is that such finding was clearly erroneous, since a perusal of the complaint and the affidavit accompanying same shows that plaintiff made no attempt to show any cause for the issuance of the injunction without bond.

We have considered the other points urged but we do not think that it would serve any useful purpose to discuss them.

We are impelled to hold that the temporary injunction was improvidently granted and that it should be dissolved.

The judgment order of this court is entered without prejudice to plaintiff making another application for a temporary injunction, if it sees fit to do so, provided notice of such application is served upon defendants.

The order of the Circuit court of Cook county granting plaintiff a temporary injunction is reversed and the writ of injunction issued pursuant to said order is dissolved.

ORDER FOR TEMPORARY INJUNCTION REVERSED. WRIT OF INJUNCTION DISSOLVED.

Friend, P. J., and Scanlan, J., concur.

43062

In the Matter of the Estate of
Franklin Magill, Deceased,

---

FRANK W. HEISKELL, as Administrator of the Estate of FRANKLIN MAGILL, Deceased,

Petitioner - Appellee,

v.

ETTA E. KLASKY,

Respondent - Appellant.



APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a citation to discover assets. The Probate Court of Cook County issued the citation upon the petition of Heiskell, Administrator of the Magill Estate. After a hearing that court decided that all but four of the items claimed were the property of the Estate. Both the administrator and the respondent appealed to the Circuit Court where the administrator prevailed and all of the property claimed was found to belong to the estate and the respondent was directed to turn it over. The Trust Company of Chicago, administrator de bonis non of the Magill Estate, was substituted in this court as appellee. Respondent has appealed.

Franklin Magill in his life time was one of the founders of Magill-Weinsheimer Co., a large printing and lithograph concern in Chicago and was at the time of his death a director and secretary-treasurer. He was also president and a principal stockholder of the New Products Corporation, owner and promotor of gear transmission inventions. He was divorced from his first wife in 1918, His only daughter Margaret Culbertson was a child of his first marriage. He remarried and his second wife died in December, 1929. Ella Klasky, respondent, was employed as stenographer and secretary by Magill-Weinsheimer Co. continuously for 30 years until January 18, 1943. Since 1930 she had worked exclusively for Magill. At the time of

the trial she was 50 years of age.

Magill died January 13, 1943, when he was more than 72 years of age. Heiskell was appointed administrator January 14, 1943 and his petition for the citation was filed January 18, 1943. Pursuant to the petition, respondent was cited to show cause why she should not turn over certain personal property as assets of the Magill Estate. She claimed to be a donee. The Probate Court order found that she owned certificate No. 1 for 10,000 shares of Magill-Weinsheimer Co. common stock; one-third of certificate No. 112 for 1403 shares of New Products Corporation common stock; a wrist watch, three diamond rings, bracelet and brooch; and the proceeds of a $2,500 cashier's check dated February 29, 1940. After a trial in the Circuit Court, the order subject of this appeal was entered December 6, 1943. It numbered 33 items involved in the proceeding and found that all were the property of Magill at his death and belonged to the estate. This appeal affects only alleged assigned accounts, a $25,000 note, 5 uncashed cashier checks, proceeds of another cashier check, certain stock certificates, and a few items of jewelry.

Respondent's contentions here fall under three headings: (1) that she was deprived of a fair trial by the hostility of the trial court; (2) that for that reason the usual presumptions in favor of a judgment should not be indulged and, furthermore, the evidence requires judgment for respondent and (3) that even if it were shown that the gifts were procured by undue influence or fraud, the court had no jurisdiction in a citation proceeding to set aside the gifts on that ground, but that, nevertheless, there was no evidence of fraud or undue influence nor was such a relationship shown between respondent and Magill as justifies a presumption of fraud or undue influence.

The respondent claims that the court violated a fundamental right by refusing to permit her to confer and communicate with

the total [illegible] of [illegible].

[illegible]

years of age. [illegible]

1949 and his [illegible]

[illegible]

she should not [illegible]

the [illegible]

order [illegible]

(b) III- [illegible]

(c) II [illegible]

[illegible]

[illegible] of

after [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

(i) that [illegible]

[illegible]

[illegible] of [illegible]

[illegible]

were [illegible]

[illegible]

the [illegible]

[illegible]

evidence of fraud or undue influence nor was there [illegible] such

[illegible] between respondent and [illegible] to justify a [illegible] of

fraud or undue influence.

The respondent claims that the court violated a fundamental right by refusing to permit her to confer and communicate with

her counsel and to be present in court during all stages of the trial. Respondent was extensively examined by the attorney for the executor. She was admonished not to talk to anyone, during intermissions, including her attorney. The latter requested the same admonition to be given a witness whom he was examining. There were other instances of the admonition as well as the exclusion of the respondent from the court. Respondent's attorney did not object to the admonition or to the order of exclusion, but appears to have been satisfied with the court's conduct. It is argued here that if objection had been made it would have been worse than useless and respondent would have faced "certainty of defeat". We cannot presume that a trial court would be unfair in ruling. Since no objection was made in the trial court, we see no reason to consider the incidents here. Respondent was not denied counsel nor can we see any violation of her rights. It is said that the trial court manifested hostility in rulings upon objections to her testimony. We have examined the record and find that on several occasions the trial court sought with firmness to have the respondent give responsive answers. We find no hostility. Another complaint is that material evidence offered on behalf of respondent was excluded. We shall discuss this hereinafter.

Respondent contends that there was no evidence that the gift transactions were induced by fraud or undue influence and that under the relationship here, such factors cannot be presumed and, moreover, the court not having fully equity jurisdiction, had no power even if those factors were present to declare a constructive trust and set aside the gifts. The order appealed from found that respondent was Magill's confidante and that she had not proved the elements of a gift. That finding is not that a gift was induced by fraud, but that a gift was not made. There is no question therefore of declaring a constructive trust or setting aside the gifts, and there is no merit to the contention. This proceeding is provided by statute to discover

assets of an estate and compel their delivery. Hire v. Hrudicka, 379 Ill. 201.

The order, subject of this appeal, finds:

> " * * * that the following property was the property of Franklin Magill at the time of his death and belongs to his estate:
>
> (1) * * *
>
> (2) Amount due on open account from Magill-Weinsheimer Company as of January 13, 1943. Letter of May 14, 1938 . . . . . $5,055.90
>
> (3) Amount due on open account from New Products Corporation as of January 13, 1943. Letter of May 14, 1938 . . . . . 24,280.40
>
> * * * * * * * * * *
>
> IT IS THEREFORE ORDERED that Etta Klasky turn over to the Administrator of the **** all of the above property *****".

The "letters" of May 14, 1938, were substantially the same and read as follows:

> "Pay to the order of Etta E. Klasky amounts standing to my credit. She has instructions and authority to disburse in accordance with my wishes."

Respondent argues that the court was without jurisdiction to decide in a citation proceeding the legal effect of the instruments. Petitioner argues that the court did not determine that the instruments were valid or invalid, but merely whether Magill had made a gift of the instruments. Respondent replies that the court did not decide that the instruments belonged to Magill, but that the amounts in the account did and directed her to pay them. The Probate Court order found that respondent had no right to the accounts due, either by virtue of the "letters" or otherwise. It is not clear what, precisely, the Circuit Court found and ordered with respect to these items.

The instruments specified no amount, nor did they designate any date at which, if they were assignments, the amount assigned can be fixed. The order fixes the amount due on the date of Magill's death. It would appear that the order directed respondent to turn over, not the instruments, but the moneys due. The court had jurisdiction to decide that respondent should turn over the instruments, but not

assets of an estate are [illegible] [illegible] . [illegible] v. [illegible], 272 Ill. 201.

The court, in [illegible] of [illegible], said:

"[illegible] Franklin Wright at the time of his death belonged to his estate;

(1) [illegible]

(2) [illegible] 1905. [illegible]

(3) [illegible]

[illegible]

the [illegible]

[illegible] as follows:

"[illegible] to my [illegible] in accordance [illegible]

[illegible] in a citation [illegible] petitioner [illegible] were valid [illegible] the instrument. [illegible] that the instrument [illegible] account [illegible] found that [illegible] validity of the "letters" or citation. [illegible] the Circuit Court found and ordered [illegible]

The instruments specified [illegible] date at which, if they were a bequest, the [illegible] fixed. The court fixes the amount due on the [illegible] death. It would appear that the order directing respondent to turn over not the instruments, but the money due. The court had jurisdiction to decide that respondent should turn over the instruments, but not

to determine that she should turn over the proceeds of the accounts. Johnson v. Nelson, 341 Ill. 119; Dawdy v. Strickland, 378 Ill. 230. The debtors are the Magill-Weinsheimer Co. and the New Products Corporation. If the instruments were gifts to her, respondent must collect upon them as creditor of those concerns. If the instruments are assets of the estate, the administrator must collect upon them. The disputed instruments, if the court so determined, are assets of the Magill Estate in the sense that the effect of turning them over to the estate would be to extinguish respondent's claims to the accounts. We point out that if our construction of the order is correct, an injustice arises from the direction to turn over the amounts specified. She has not received any moneys from the accounts.

The record shows that respondent was called by petitioner "as an adverse witness under section 60 of the Practice Act". She was the court's witness in this proceeding. Keshner v. Keshner, 376 Ill. 354; Merchant's Loan and Trust Co. v. Egan, (222 Ill. 494) 143 Ill. App. 572; In re Estate of Halaska, 307 Ill. App. 176; Price, et al v. Meier, 324 Ill. App. 313. In this citation proceeding the estate will gain and the respondent lose, or vice versa, depending upon final decision. Their interests are to that extent adverse. We believe, however, Section 60 is not applicable even though respondent might have been practically an adverse or reluctant witness so far as petitioner was concerned (Keshner v. Keshner), There is no plaintiff or defendant, nor any counter-alignment of parties in this proceeding. Hire v. Hrudicka. The petitioner was not bound by respondent's testimony for she was the court's witness even though she was examined by counsel for petitioner. Merchants Loan & Trust Co. v. Egan; In re Estate of Halaska.

It would seem that an orderly procedure would be for the court, if it wished to examine respondent, to conduct the examination through attorney for the petitioner or respondent as the event requires. This suggestion brings up the point whether section 2 of the Evidence

to determine that she should turn over the proceeds of the account.
Johnson v. Nelson, 301 Ill. 119; Lewis v. Whiteland, 75 Ill. 502.
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Corporation. If the instruments were quite to her, respondent must
collect upon them as creditor of these concerns. If the instruments
are assets of the estate, the administrator must collect upon them.
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the Magill estate in the amount [illegible] of [illegible] the
to the estate would be to satisfy a [illegible] claim [illegible] the account.
We point out that if [illegible] injustice arises from the [illegible] to turn over [illegible]
she has not received any money from the [illegible].

The second error [illegible] was an advere witness under section 21 of [illegible]
was the court's witness in this proceeding. [illegible] v. [illegible], [illegible] Ill.
524; Merchant's Loan [illegible] v. [illegible], [illegible] Ill.
App. 272; In re Estate of [illegible], [illegible] Ill. [illegible]; [illegible] v.
Weber, 324 Ill. App. 327. In this [illegible] to [illegible]
[illegible] and the respondent [illegible] decision. Their intent to use to their advantage [illegible]
However, Section 60 is not [illegible] even [illegible]
been practically an adverse or [illegible] [illegible]
was concerned (Conner v. Beebner), [illegible] nor any counter-alignment of parties in the proceeding. Lane v.
Hendricks. The petitioner was not bound [illegible] testimony for
she was the court's witness even though she [illegible] examined by counsel
for petitioner. Merchants Loan & Trust Co. v. [illegible] In re Estate of
Halsey.

It would seem that an orderly procedure would be for the court, if it wished to examine respondent, to conduct the examination through attorney for the petitioner or respondent as the event requires. This suggestion brings us to the point whether section 2 of the Evidence

Act applies in a citation proceeding. If this were a proceeding between petitioner and respondent, the former could avail himself of respondent's disqualification under section 2 and object to her testimony of transactions preceding Magill's death, unless he chose to waive his right and call her as his witness. In this event if he opened the door to transactions prior to Magill's death she could be examined by her own attorney upon the same transaction. The purpose of section 2 is to protect against disadvantage from the lack of testimony, through death, to meet that of the witness. The estate would suffer no less in this proceeding, however, if the trial court, because respondent was its witness, over objection of petitioner, elicited testimony of transactions prior to Magill's death. We believe, therefore, that section 2 of the Evidence Act, unless the disqualification is waived by the administrator's failure to object, is applicable in a citation proceeding. If the court does inquire into such transactions without objection from attorney for petitioner, respondent should be permitted to testify to the same transaction under examination by her attorney.

At the close of her examination "under Section 60", respondent's attorney examined her further. In several instances, on objection the court limited the examination and instructed her attorney to defer some questions until respondent put in her case. When respondent was called as a witness in her own behalf the court asked for an outline of proof. Her attorney, accordingly, made an offer of proof. At the close of the offer, objection was made to the form of the offer; to "some" as being incompetent and immaterial; to the part which covered transactions prior to Magill's death, as inadmissible under section 2 of the Evidence Act; and to that part covering transactions occurring on the date of Magill's death as having been already testified to by respondent under section 60 under examination of both counts. The objection was sustained.

Act applies in a citation proceeding. If the [illegible] between petitioner and respondent, [illegible] will [illegible] of respondent's disqualification under section [illegible] and object to the testimony of transactions [illegible] to waive his right [illegible] be opened the door to [illegible] be examined by [illegible] purpose of testing [illegible] of testimony, through death, [illegible] not to would [illegible] court, [illegible] elicited testimony [illegible] believe, however, [illegible] difficulties [illegible] to objection in [illegible] into such [illegible] respondent [illegible] under examination by [illegible].

[illegible] "[illegible]" [illegible] cross examine [illegible] the court limited the [illegible] defer some questions until [illegible] was called as a witness [illegible] of proof. Her testimony, corroborated [illegible] alone of the effect, objection [illegible] "some" as being incompetent and [illegible] transactions which covered on the date of Kerrill's death, [illegible] under section 2 of the Evidence Act; and to that part covering transactions occurring respondent under section 60 under examination of both counts. The objection was sustained.

The court did not require particularization of the objections to transactions prior to Magill's death. The offer shows, however, that certain of these transactions were testified to by respondent under examination by attorney for petitioner. As to these, the objection should have been overruled. It is true that some testimony of all events on January 13, 1943, following Magill's death, was given by respondent when examined by petitioner's counsel and the further examination by her own counsel. But, there was some restraint by the court with some promise that respondent could give further testimony in her own behalf. There is a difference in "covering an event" when examined as an adverse witness and when a witness in one's own behalf. We think that at the risk of testifying "over" to some of these events, she was entitled to give the further testimony. There was no designation of the part of the offer objected to as incompetent and immaterial. Petitioner says that respondent made no attempt to distinguish any part. She was not asked to do so. He further says the court was not obliged to sift out the competent from the incompetent. The court asked for the offer. It should have had objecting counsel point out the items objected to.

Included in the offer were many canceled checks drawn against Magill's account. Respondent sought to introduce these checks to show that Magill in his lifetime paid certain of her expenses, such as utilities and rent. There was also included a series of telegrams and letters written by Magill to respondent while she was on trips away from Chicago, beginning in 1930. These communications are personal and contain terms of endearment, expressed affection and gratitude and some apparently transmitted money. We think the exclusion of this documentary evidence was serious error. Respondent claims to be the donee of valuable items of property, much of which was in her possession at the time of Magill's death. Petitioner contends and the court found that respondent was not owner of these items. There are circumstances and exhibits which support the position

of each. There are memoranda in which Magill stated in writing that certain items are the property of respondent and testimony of his oral statements to that effect; and evidence of respondent's care of Magill during sickness, his affection for and his reliance upon her and the lack of intimacy between Magill and his daughter Mrs. Culbertson. On the other hand there is testimony that Magill transferred property to respondent to remove it from danger of involvement in litigation; that despite memoranda indicating gifts to respondent of certain items, Magill's and respondent's treated those items in a manner inconsistent with the idea of gifts; evidence that certain items claimed to be in her possession were not; and evidence that certain of the transactions were testamentary in character.

In this state of the record, the issue appears to be whether the property claimed by respondent is hers by virtue of gifts, or whether they were subject of testamentary devices or transactions in aid of business purposes. The question, therefore, of donative intent is vital. We think the documentary evidence offered was clearly relevant to that issue and should have been admitted. 38 C.J.S. p 867 (b), 882 (c). We cannot consider that evidence in respondent's favor on this appeal, even though it should have been received at the trial, for we are limited on review to consider only evidence admitted by the trial court.

This case should be retried. Petitioner is entitled to whatever advantage by way of admission may rise from the fact that respondent has relinquished her claims to items she heretofore contended were gifts, as well as arising from the fact that certain items not claimed by her were designated by Magill as her property and later used by him for his own purpose.

The court admitted some and rejected other evidence of Magill's business and personal characteristics as bearing upon donative intent. This evidence was admissible. 38 C.J.S. 868. So also is the evidence of respondent's attention to Magill when

of [illegible]. There are [illegible] certain items are the property of [illegible] testimony of the oral statements to that effect; and [illegible] Magill during [illegible], his direction [illegible] and the lack of a [illegible] between [illegible] con. On the other hand [illegible] property to respondent [illegible] litigation; that despite [illegible] certain items, Magill [illegible] manner inconsistent [illegible] claimed to be in her possession [illegible] of the transactions [illegible].

In this [illegible] the property of [illegible] whether they were [illegible] nic of business [illegible] is vital. [illegible] relevant to that [illegible] (b), 326 (c). [illegible] on this score, even [illegible] for is are limited [illegible] the trial court.

This [illegible] should be [illegible] whatever advantage [illegible] respondent was entitled [illegible] were gifts, as well as [illegible] claimed by her were designated by Magill [illegible] used by him for his own purposes.

The court admitted some and rejected other evidence of Magill's business and personal characteristics as bearing upon donative intent. This evidence was admissible. 38 C.J.S. 866. So also is the evidence of respondent's attention to Magill when

he was sick in 1940 (Sando v. Smith, 237 Ill. App. 570) and the testimony of Mrs. Culbertson's relations with her father since 1926. Jackson v. Pillsbury, 380 Ill. App. 554.

For the reasons given the order of the Circuit Court is reversed and the cause is remanded for retrial in a manner consistent with this opinion.

ORDER REVERSED AND CAUSE REMANDED.

BURKE, P.J. CONCURS.

LEWE, J. TOOK NO PART.

He was sick in 1940 (Sando v. Smith, 297 [illegible], [illegible], 300) and the testimony of Mrs. Gulbertson's relations with her father since 1940, Jackson v. Pillsbury, 180 [illegible], [illegible], 654.

For the reasons given the order of the circuit [illegible] reversed and the cause is remanded. The mandate [illegible] consistent with this opinion.

[illegible]

BURKE, P.J., [illegible].

LEWIS, J., [illegible].

43062

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|---|---|
| In the Matter of the Estate of FRANKLIN MAGILL, Deceased, | 327 I.A. 212 |
| FRANK W. HEISKELL, as Administrator of the Estate of FRANKLIN MAGILL, Deceased, | APPEAL FROM |
| Petitioner - Appellee, | CIRCUIT COURT |
| v. | COOK COUNTY. |
| ETTA E. KLASKY, | |
| Respondent - Appellant. | |

ON REHEARING

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a citation to discover assets. The Probate Court of Cook County issued the citation upon the petition of Heiskell, Administrator of the Magill Estate. After a hearing that court decided that all but four of the items claimed were the property of the Estate. Both the administrator and the respondent appealed to the Circuit Court where the administrator prevailed and all of the property claimed was found to belong to the estate and the respondent was directed to turn it over. The Trust Company of Chicago, administrator de bonis non of the Magill Estate, was substituted in this court as appellee. Respondent has appealed.

Franklin Magill in his life time was one of the founders of Magill-Weinsheimer Co., a large printing and lithograph concern in Chicago and was at the time of his death a director and secretary-treasurer. He was also president and a principal stockholder of the New Products Corporation, owner and promoter of gear transmission inventions. He was divorced from his first wife in 1918. His only daughter Margaret Culbertson was a child of his first marriage. He remarried and his second wife died in December, 1929. Ella Kalsky, respondent, was employed as stenographer and secretary by Magill-Weinsheimer Co. continuously for 30 years until January 18, 1943. Since 1930 she had worked exclusively for Magill. At the time of

the trial she was 50 years of age.

Magill died January 13, 1943, when he was more than 72 years of age. Heiskell was appointed administrator January 14, 1943 and his petition for the citation was filed January 18, 1943. Pursuant to the petition, respondent was cited to show cause why she should not turn over certain personal property as assets of the Magill Estate. She claimed to be a donee. The Probate Court order found that she owned certificate No. 1 for 10,000 shares of Magill-Weinsheimer Co. common stock; one-third of certificate No. 112 for 1403 shares of New Products Corporation common stock; a wrist watch, three diamond rings, bracelet and brooch; and the proceeds of a $2,500 cashier's check dated February 29, 1940. After a trial in the Circuit Court, the order subject of this appeal was entered December 6, 1943. It numbered 33 items involved in the proceeding and found that all were the property of Magill at his death and belonged to the estate. This appeal affects only alleged assigned accounts, a $25,000 note, 5 uncashed cashier checks, proceeds of another cashier check, certain stock certificates, and a few items of jewelry.

Respondent's contentions here fall under three headings: (1) that she was deprived of a fair trial by the hostility of the trial court; (2) that for that reason the usual presumptions in favor of a judgment should not be indulged and, furthermore, the evidence requires judgment for respondent and (3) that even if it were shown that the gifts were procured by undue influence or fraud, the court had no jurisdiction in a citation proceeding to set aside the gifts on that ground, but that, nevertheless, there was no evidence of fraud or undue influence nor was such a relationship shown between respondent and Magill as justifies a presumption of fraud or undue influence.

The respondent claims that the court violated a fundamental right by refusing to permit her to confer and communicate with her counsel and to be present in court during all stages of the trial. Respondent was extensively examined by the attorney for the executor. She was admonished not to talk to anyone,during intermissions, including her attorney. The latter requested the same admonition to be given a witness whom he was examining. There were other instances of the admonition as well as the exclusion of the respondent from the court. Respondent's attorney did not object to the admonition or to the order of exclusion, but appears to have been satisfied with the court's conduct. It is argued here that if objection had been made it would have been worse than useless and respondent would have faced "certainty of defeat". We cannot presume that a trial court would be unfair in ruling. Since no objection was made in the trial court, we see no reason to consider the incidents here. Respondent was not denied counsel nor can we see any violation of her rights. It is said that the trial court manifested hostility in rulings upon objections to her testimony. We have examined the record and find that on several occasions the trial court sought with firmness to have the respondent give responsive answers. We find no hostility. Another complaint is that material evidence offered on behalf of respondent was excluded. We shall discuss this hereinafter.

Respondent contends that there was no evidence that the gift transactions were induced by fraud or undue influence and that under the relationship here, such factors cannot be presumed and, moreover, the court not having full equity jurisdiction, had no power even if those factors were present to declare a constructive trust and set aside the gifts. The order appealed from found that respondent was Magill's confidante and that she had not proved the elements of a gift. That finding is not that a gift was induced by fraud, but that

a gift was not made. There is no question therefore of declaring a constructive trust or setting aside the gifts, and there is no merit to the contention. This proceeding is provided by statute to discover assets of an estate and compel their delivery. Hire v. Hrudicka, 379 Ill. 201.

The order, subject of this appeal, finds:

> " * * * that the following property was the property of Franklin Magill at the time of his death and belongs to his estate:
>
> (1) * * *
>
> (2) Amount due on open account from Magill-Weinsheimer Company as of January 13, 1943. Letter of May 14, 1938 . . . . .$5,055.90
>
> (3) Amount due on open account from New Products Corporation as of January 13, 1943. Letter of May 14, 1938 . . . . 24,280.40
>
> * * * * * *
>
> IT IS THEREFORE ORDERED that Etta Klasky turn over to the Administrator of the **** all of the above property ****."

The "letters" of May 14, 1938, were substantially the same and read as follows:

> "Pay to the order of Etta E. Klasky amounts standing to my credit. She has instructions and authority to disburse in accordance with my wishes."

Respondent argues that the court was without jurisdiction to decide in a citation proceeding the legal effect of the instruments. Petitioner argues that the court did not determine that the instruments were valid or invalid, but merely whether Magill had made a gift of the instruments. Respondent replies that the court did not decide that the instruments belonged to Magill, but that the amounts in the account did and directed her to pay them. The Probate Court order found that respondent had no right to the accounts due, either by virtue of the "letters" or otherwise. It is not clear what, precisely, the Circuit Court found and ordered with respect to these items.

The instruments specified no amount, nor did they designate any date at which, if they were assignments, the amount assigned can be fixed. The order fixes the amount due on the date of Magill's death. It would appear that the order directed respondent to turn

over, not the instruments, but the moneys due. The court had jurisdiction to decide that respondent should turn over the instruments, but not to determine that she should turn over the proceeds of the accounts. Johnson v. Nelson, 341 Ill. 119; Dawdy v. Strickland, 378 Ill. 230. The debtors are the Magill-Weinsheimer Co. and the New Products Corporation. If the instruments were gifts to her, respondent must collect upon them as creditor of those concerns. If the instruments are assets of the estate, the administrator must collect upon them. The disputed instruments, if the court so determined, are assets of the Magill Estate in the sense that the effect of turning them over to the estate would be to extinguish respondent's claims to the accounts. We point out that if our construction of the order is correct, an injustice arises from the direction to turn over the amounts specified. She has not received any moneys from the accounts.

The record shows that respondent was called by petitioner "as an adverse witness under section 60 of the Practice Act". She was the court's witness in this proceeding. Keshner v. Keshner, 376 Ill. 354; Merchant's Loan and Trust Co. v. Egan, (222 Ill. 494) 143 Ill. App. 572; In re Estate of Halaska, 307 Ill. App. 176; Price, et al. v. Meier, 324 Ill. App. 313. In this citation proceeding the estate will gain and the respondent lose, or vice versa, depending upon final decision. Their interests are to that extent adverse. We believe, however, Section 60 is not applicable even though respondent might have been practically an adverse or reluctant witness so far as petitioner was concerned (Keshner v. Keshner), There is no plaintiff or defendant, nor any counter-alignment of parties in this proceeding. Hire v. Krudicka. The petitioner was not bound by respondent's testimony for she was the court's witness even though she was examined by counsel for petitioner. Merchants Loan & Trust Co. v. Egan; In re Estate of Halaska.

It would seem that an orderly procedure would be for the court, if it wished to examine respondent, to conduct the examination through attorney for the petitioner or respondent as the event requires. This suggestion brings up the point whether section 2 of the Evidence Act applies in a citation proceeding. If this were a proceeding between petitioner and respondent, the former could avail himself of respondent's disqualification under section 2 and object to her testimony of transactions preceding Magill's death, unless he chose to waive his right and call her as his witness. In this event if he opened the door to transactions prior to Magill's death she could be examined by her own attorney upon the same transaction. The purpose of section 2 is to protect against disadvantage from the lack of testimony, through death, to meet that of the witness. The estate would suffer no less in this proceeding, however, if the trial court, because respondent was its witness, over objection of petitioner, elicited testimony of transactions prior to Magill's death. We believe, therefore, that section 2 of the Evidence Act, unless the disqualification is waived by the administrator's failure to object, is applicable in a citation proceeding. If the court does inquire into such transactions without objection from attorney for petitioner, respondent should be permitted to testify to the same transaction under examination by her attorney.

At the close of her examination "under Section 60", respondent's attorney examined her further. In several instances, on objection the court limited the examination and instructed her attorney to defer some questions until respondent put in her case. When respondent was called as a witness in her own behalf the court asked for an outline of proof. Her attorney, accordingly, made an offer of proof. At the close of the offer, objection was made to the form of the offer; to "some" as being incompetant and

immaterial; to the part which covered transactions prior to Magill's death, as inadmissible under section 2 of the evidence Act; and to that part covering transactions occurring on the date of Magill's death as having been already testified to by respondent under section 60 under examination of both counts. The objection was sustained.

The court did not require particularization of the objections to transactions prior to Magill's death. The offer shows, however, that certain of these transactions were testified to by respondent under examination by attorney for petitioner. As to these, the objection should have been overruled. It is true that some testimony of all events on January 13, 1943, following Magill's death, was given by respondent when examined by petitioner's counsel and the further examination by her own counsel. But, there was some restraint by the court with some promise that respondent could give further testimony in her own behalf. There is a difference in "covering an event" when examined as an adverse witness and when a witness in one's own behalf. We think that at the risk of testifying "over" to some of these events, she was entitled to give the further testimony. There was no designation of the part of the offer objected to as incompetent and immaterial. Petitioner says that respondent made no attempt to distinguish any part. She was not asked to do so. He further says the court was not obliged to sift out the competent from the incompetent. The court asked for the offer. It should have had objecting counsel point out the items objected to.

In the offer of proof, reference was made to many cancelled checks drawn against Magill's account and a series of telegrams and letters written by Magill to respondent while she was on trips away from Chicago, beginning in 1930. After the court sustained the objection to the offer of proof, respondent offered the checks and written communications in evidence. Objection was made that the proffered exhibits were immaterial and were transactions prior to

Magill's death. The court sustained the objections and excluded the exhibits. Respondent sought to introduce the checks to show that Magill in his lifetime paid certain of her expenses, such as utilities and rent. The letters and telegrams were offered as showing the relationship of the parties and bearing upon donative intent. These communications are personal and contain terms of endearment, express affection and gratitude and some, apparently, transmitted money. We think the exclusion of this documentary evidence was error.

Respondent claims to be the donee of valuable items of property, most of which were in her possession at the time of Magill's death. Petitioner contends and the court found that respondent was not owner of these items. There are circumstances and exhibits which support the position of each. There are memoranda in which Magill stated in writing that certain items are the property of respondent and testimony of his oral statements to that effect; and evidence of respondent's care of Magill during sickness, his affection for and his reliance upon her and the lack of intimacy between Magill and his daughter Mrs. Culbertson. On the other hand there is testimony that Magill transferred property to respondent to remove it from danger of involvement in litigation; that despite memoranda indicating gifts to respondent of certain items, Magill's and respondent's treated those items in a manner inconsistent with the idea of gifts; evidence that certain items claimed to be in her possession were not; and evidence that certain items claimed by her as gifts, were given her to be distributed according to Magill's wishes.

In this state of the record, the question, of donative intent was vital. We think the documentary evidence offered was clearly relevant to that issue and should have been admitted. 38 C. J. S. p. 867 (b), 882 (c). We cannot consider that evidence in respondent's favor on this appeal, even though it should have been received at the trial, for we are limited on review to consider only evidence admitted by the trial court.

This case should be retried. Petitioner is entitled to whatever advantage by way of admission may arise from respondents' relinquishment of her claim to any items which she may have heretofore contended were gifts, as well as arising from the fact that certain items not claimed by her were designated by Magill as her property and later used by him for his own purpose.

The court admitted some and rejected other evidence of Magill's business and personal characteristics as bearing upon donative intent. This evidence was admissible. 38 C. J. S. 868. So also is the evidence of respondent's attention to Magill when he was sick in 1940 (Sando v. Smith, 237 Ill. App. 570) and the testimony of Mrs. Culbertson's relations with her father since 1926. Jackson v. Pillsbury, 380 Ill. 554.

For the reasons given the order of the Circuit Court is reversed and the cause is remanded for retrial as to the items subject of this appeal, and in a manner consistent with this opinion.

ORDER REVERSED AND CAUSE REMANDED.

BURKE, J. CONCURS.

LEWE, J. TOOK NO PART.

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| PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. CHESTER RUDNICKI, Plaintiff in Error. | ) | ERROR TO CRIMINAL COURT COOK COUNTY. |



MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review the conviction of Chester Rudnicki of the crime of conspiracy. The jury found him guilty as charged, fixed his punishment at imprisonment in the penitentiary and his fine at $2,000. The trial court fixed the imprisonment at not less than three or more than five years.

Included in the indictment with Rudnicki were Valaskas and Pelka. The jury found Valaskas not guilty and Pelka guilty. The latter has not appealed. The indictment alleged a conspiracy to obtain money, etc. from persons or firms or corporations by means of the confidence game through the use of bogus checks purporting to be drawn by the Strand Manufacturing Company of Chicago.

Pelka devised an ingenious scheme to pass the bogus checks. He studied the wages and working hours of the companies whose names were used on the checks. He had check forms made and printed in the names of those firms. He induced girls, with promises of handsome profits, to agree to pass the checks. He procured defense work garb for them. He had identification badges and cards made to conform with the firm names on the bogus checks. He caused the girls to be photographed and reproductions of the photographs to be placed on the badges and cards. He trained the girls in outlying stores of Chicago for their later unlawful practice in the Loop area. He disciplined them in memorizing the false information

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|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | MEMO TO |
| Defendant in Error, | |
| v. | DEFENSE BRIEF |
| CHESTER RUDNICKI, | |
| Plaintiff in Error. | |

MR. PRESIDING JUSTICE [illegible] MILLER delivered the opinion of the court:

This is a writ of error to review the conviction of Chester Rudnicki of the crime of robbery. The jury found him guilty as charged. Fixed his punishment at imprisonment in the penitentiary one hour and fifty years. The trial court sized the imprisonment at not less than three [illegible] nor more than [illegible] years.

Included in the indictment with Rudnicki were [illegible] and Polke. The jury found Williams not guilty and Polke guilty. The latter has not appealed. The indictment charged a conspiracy to obtain money, etc., from persons by false pretenses by means of the confidence - game through the use of bogus checks purporting to be checks, [illegible] of Chicago.

Polke testified on behalf of the defendants. He stated the [illegible] he studied the [illegible] of the companies whose names were used on the checks. [illegible] firm [illegible] in the names of these firms. [illegible] girls, [illegible] handsome profits, [illegible] work grab for them. He [illegible] identified [illegible] to conform with the firm names on the bogus checks. He [illegible] the girls to be photographed [illegible] reproductions of the photographs to be placed on the badges and cards. He trained the girls in entering stores of Chicago for their later unlawful practice in the loop area. He disciplined them in memorizing the false information

necessary to deceive the inoocent victims. He chose hours after the purported payers' defense plants closed for the passing of the checks so that unwary business people would fail in their efforts to identify the check passers. He divided the unlawful profits with the girls, encouraged their efforts and discouraged any intention they might have to give up the enterprise.

The bogus checks used in convicting Pelka and Rudnicki purported to be drawn on Chicago banks by the Strand Manufacturing Company, Inc. against its payroll account. The names of the fictitious payees and amounts were typewritten and amounts impressed with a check protector. The checks were all in the same amount, $32.26. At the lower left hand corner of the checks were printed forms containing spaces for the amount of the gross wages, the Old Page Pension and Income Tax deductions and the net wages.

Rudnicki says that Pelka's guilt was shown beyond a reasonable doubt, but that the proof against him fell short of that standard. The State pointed out that the same evidence convicted Rudnicki as convicted Pelka. Rudnicki answers that he testified in his own defense and that Pelka did not.

Rudnicki was at that time employed by the Progressive Hotel Association, operators of the Bryson and several other hotels and cafeterias. He was employed as an auditor and accountant and his duties included issuing checks for payment of bills and wages. He spent several days each week at the Bryson where his office was located on the 10th floor. He had known Pelka all his life. They "bet horses" every afternoon and about twice a week played cards together at a gas station.

Pelka had been in the printing business and had his own shops for several years but, at the time of the check transactions, was a printing solicitor. The Bryson and other Progressive Hotels were his customers. He had lived under an assumed name for some

necessary to deceive the innocent victims. A close scrutiny of the purported several patents shows clearly the erasing of the checks so that unwary victims would fall in their efforts to identify the crook as one. It divorced the [illegible] with the girls, consequently their efforts were disconnected by intention they might have to give up the [illegible].

The rogue [illegible] purported to be from an [illegible] Company, Inc. [illegible] fictitious [illegible] with a check [illegible] #32,26. At the [illegible] forms containing [illegible] Old Page Function [illegible].

Hudnicki says [illegible] able doubt, [illegible] established. The [illegible] Hudnicki as [illegible] in his own defense [illegible].

Hudnicki [illegible] Association, operators of [illegible] cafeterias. He was employed [illegible] duties included [illegible] spent several days each week at the Bryson [illegible] office located on the 10th floor. He has known [illegible] "bet horses" every afternoon and about twice a week [illegible] together at a gas station.

Police had been in the printing business and had his own shops for several years but, at the time of the check transactions, was a printing solicitor. The Bryson and other Progressive Jewels were his customers. He had lived under an assumed name for some

time in 1943, in a hotel across the street from the Bryson. In September and October of 1943 - the period subject of the indictment - he lived under his true name at the Bryson on the 10th floor several feet away from Rudnicki's office.

The most damaging testimony against Rudnicki was that of Donna Peay and Geraldine Hunter who participated in Pelka's check passing ring. They participated for a couple of weeks. They had met Pelka in August and on or about September 13th began cashing the bogus checks under his direction. At the time of the trial these girls had already been convicted of a confidence game, as a result of their passing the bogus checks. They had not yet been sentenced and their applications for probation were then pending. They were not indicted for conspiracy. They met Rudnicki at a party at their apartment in the latter part of September. They had heard of him previously from Pelka who had referred to him often as Andy. Rudnicki had been known as Andy since his boyhood days. His radio was used for music at the late September party. It is upon their testimony that the State relies for directly connecting Rudnicki to the conspiracy.

Pelka told the girls that before the war he typed the checks himself, using different machines, and that since the war he depended upon other persons for the typing. On October 12, 1943, the girls accompanied Pelka to Valaska's place of employment, picked the latter up and drove to his printing shop. This testimony was corroborated by a fellow employee of Valaska's. Pelka brought out of Valaska's shop "the usual bundle of checks" and then drove to the Bryson Hotel where the checks were to be typed. He left the girls in front of the Bryson while he went in. He returned and told the girls that the "guy" was having a party and could not type the checks and that they would meet him about "seven" at a gas station on Archer Avenue to pick up the checks. Rudnicki and other witnesses corroborated the girls' testimony to the extent that Pelka came to Rudnicki's office at that time and while

time in 1942, in a hotel across the street from the prison. In September and October of 1942 - the period [illegible] - he lived under his true name [illegible] feet away from Bundicki's office.

The most [illegible] testimony against Bundicki [illegible] Donna Fay and Geraldine Barrett [illegible] passing ring. They [illegible] met Pelke in August and on [illegible] bogus checks under his direction. [illegible] girls had already been convicted [illegible] of their passing the checks. [illegible] and their activities [illegible] not indicated any conviction. [illegible] apartment in the latter part of [illegible] previously from Pelke who [illegible] had been known as Tony since [illegible] for music at the Lyceum [illegible] that the State relies [illegible] "Pelke [illegible] himself, using [illegible] upon other persons for the funds. [illegible] girls [illegible] Pelke to Valanski's place of employment, where [illegible] to his printing shop. While testimony was [illegible] employee of Valanski. Pelke brought out of [illegible] the usual bundle of checks" and then drove to the Lyrson Hotel where the checks were to be typed. He left the girls in front of the Lyrson while he went in. He returned and told the girls that the "guy" was having a party and could not type the checks and that they would meet him about "seven" at a gas station on Archer Avenue to pick up the checks. Bundicki and other witnesses corroborated the girls' testimony to the extent that Pelke came to Bundicki's office at that time and while

"a party" was then in progress. Pelka and the girls met Rudnicki about seven o'clock at the Archer Avenue gas station. This is admitted by the defendant and testified to by other witnesses.

There are conflicts and differences in essential parts of this testimony. Mrs. Walsh, a Hotel room clerk and State witness, said that on October 12, 1943, she went to Rudnicki's office about 4:30 P.M. and stayed until about 6 P.M.; that he was the only one there when she arrived; that she was there about an hour before Pelka came in; that he said nothing, stayed a few minutes and left; that he brought no package or envelope; that she did not hear him speak; that she telephoned for the beer which was consumed; and that the beer was gone when Pelka arrived. Miss Dutt, a Hotel switchboard operator, said she went to Rudnicki's office about 5:30 P.M.; that when she arrived Mrs. Walsh, Pelka and Rudnicki were drinking beer; that she saw nothing delivered by Pelka and heard no conversation regarding checks; that he left before she did; and that she paid no attention to him. White, a Hotel night clerk, called as a defense witness, said that he and a man named Hurley were also at the party; that Pelka came in and stayed a few minutes; and that White had ordered the beer.

Neither Mrs. Walsh nor Miss Dutt mentioned White or Hurley as being present. Mrs. Walsh said the beer was gone before Pelka arrived. Miss Dutt said Pelka was drinking beer with Mrs. Walsh and Rudnicki when she arrived. Mrs. Walsh and White say that Pelka stayed but a few minutes. Rudnicki says that Pelka came in and said, "Hello" and stayed a very short time. Mrs. Walsh said she ordered the beer. White says he did.

Donna Peay and Geraldine Hunter said that when they went to the gas station, Rudnicki came over and told Pelka that he had no chance to type the checks because "the party" broke up late and that he would get the checks out the first thing in the morning.

"a party" was taken in one case. [illegible] about seven o'clock at the usual hours [illegible] admitted by the defendant [illegible]

There was [illegible] of this testimony. Mrs. [illegible] said that on Oct. [illegible] also P.M. and everywhere [illegible] there when [illegible] Felix came in [illegible] that he brought [illegible] cover; that [illegible] that the room [illegible] within hearing [illegible] 8:30 P.M.; that when [illegible] drinking beer; on [illegible] conversation [illegible] that she could not [illegible] a defense witness, [illegible] at the window [illegible] while the officers [illegible]

Neither [illegible] in being arrested. [illegible] arrived. [illegible] and Dunbrick when [illegible] stayed but a few minutes. Dunbrick [illegible] "Hello" and stayed a very short time. Mrs. [illegible] the door. While [illegible]

Doris Fay and [illegible] that when they went to the gas station, Dunbrick came over and said [illegible] no chance to type the checks because "the party" broke up late and that he would get the checks out the first thing in the morning.

Fitzgibbons, gas attendant, says that Rudnicki came to the station first, got gas, wiped off the windshield and was "all set to go" when Pelka and the girls drove in 15 minutes later, and that Rudnicki went over and talked with them. DeMatteo, owner of the gas station says that while Fitzgibbons was servicing Rudnicki's car, the latter came into the office and worked on a "scratch sheet" until Pelka drove in and that Rudnicki then walked over to Pelka's car on the driver's side. Rudnicki says that he just happened to see Pelka and the girls; that he had been in the office for a minute; that he cleaned the windshield and started to drive out when Pelka drove in; and that "he waved and joked a little" and then drove on.

We think Pelka's statement, out of Rudnicki's presence, in front of the Bryson, referring to the "guy" was rendered competent by subsequent connecting testimony. People v. Braune, 325 Ill. App. 331. We think the testimony of the girls was sufficiently corroborated by circumstances and testimony to warrant the jury accepting their story. This conclusion, we believe, is borne out by additional considerations hereinafter related.

The bogus checks introduced in evidence were written upon the typewriter and impressed with the check protector in use at the Bryson during the period covering the transactions, subject of the indictment. The names used as payees on the bogus checks were those of guestsat the Bryson. The typewriter was often carried from the office of the manager of the hotel to Rudnicki's office, starting in March, 1943. The check protector was kept in Rudnicki's office. It was in March also that Pelka moved into the hotel across the street.

Rudnicki owned a Hudson car for which he applied for a license to the Secretary of State, January 23, 1943. October 16, 1943, he applied for a transfer of this license to a Pontiac which he purchased September 30, 1943. In the sworn application signed

Fitzgibbons, gas attendant, says that Hudnicki came to the station first, got gas, wiped off the windshield and was "all set to go" when Felix and the girls drove in 10 minutes later. At that Hudnicki went over and talked with them. Hartley, owner of the gas station says that while Fitzgibbons was servicing Hudnicki's car, the latter came into the office and worked on a cocktail with Felix drove in and that Hudnicki came out of over to Felix's car on the driver's side. Hudnicki was there an just beyond it as Felix and the girls; that he was back in the office for a minute; that he cleaned the windshield and started to drive out when Felix drove in; and that "he waved and joked with Felix and then drove on."

We think Felix's statement, not of Hudnicki's, controlling in front of the Bryson, reflecting on the "guy" who remained and returned by subsequent connecting testimony. Kelly v. Hynes, 108 N.J. Eq. 631. We think the testimony of the Felix family corroborated by circumstances and testimony to our mind, "fairly accounting their story." Hale v. Kline, 31 N.J. Eq. 334. Additional considerations hereinafter appear.

The logic chosen into room in which was written upon the typewriter and immediately the Bryson in the Bryson during the central convention the [illegible] the indictment. The [illegible] in the logic clerks were those of guestest the Bryson. The typewriter was often [illegible] from the office of the manager of the hotel to Hudnicki's office, starting in March, 1942. The green protector was kept in Hudnicki's office. It was in March also that Felix moved into the hotel room the street.

Hudnicki owned a Hudson car for which he applied for a license to the Secretary of State, January 20, 1942. October 13, 1942, he applied for a transfer of this license to a Buick which he purchased September 30, 1942. In the sworn application signed

by him requesting the transfer, it was stated that the Hudson was "stored" and that Rudnicki was "salesman". He denied the statements were his. This was refuted.

Pelka gave the Hudson to the girls about 8 days before their arrest. It was to be used by them "to work" currency exchanges. October 6, 1943, under Pelka's direction, Donna Peay filed a sworn application, under the name Mary Anna Donahoe, for a certificate of title and license. The application stated the Hudson was purchased from Rudnicki September 28, 1943. Accompanying the application was a sworn Assignment of Title to Mary Anna Donahoe purporting to be signed by Rudnicki. Rudnicki denied any participation in these fraudulent activities and insisted that he had sold the Hudson to DeMatteo for $75.00. The latter denied such a sale.

Rudnicki finished school in 1936. He began to work for the Progressive Hotel Association in 1940 at $85.00 per month. He bought a gas station in 1942. At the time of the trial his salary was $175 per month. He had an additional income of $200 a month from a lease of his gas station. He bought the Pontiac for $1200. He did not trade the Hudson in this purchase. He paid $524 by check September 30, and $300 more October 7, 1943 upon the purchase. He had also bought a house in Downers Grove.

Rudnicki said he needed the typewriter in preparing his reports. This was met by testimony that his typewritten reports were not made after the early part of 1943 and that thereafter his only reports were in pen and ink. His claim that he used the typewriter to prepare daily reports for White was denied by White in rebuttal. He had testified in defense for Rudnicki. There was corroboration of only part of Rudnicki's testimony that he caused the lock on his door to be changed on more than one occasion and a panel replaced in the door to his office.

by him requesting the transfer, it was stated that the bureau was "stored" and that Rudnicki was "unassigned". He stated the statements were false. This was refused.

Police gave the Hudson to the [illegible] their arrest. It was [illegible] October 3, 1943, under false direction, [illegible] sworn application, under the name [illegible] of title and license. The [illegible] unknown from [illegible] 10, 1943. [illegible] application was a sworn [illegible] purporting to be signed by [illegible] tion in these fraudulent [illegible] the Hudson to Jackson for [illegible].

Rudnicki thinking [illegible] the Progressive Hotel [illegible] bought a gas station in [illegible] was $175 per month. He was an [illegible] from a lease of the gas station. [illegible] he did not trace the Hudson [illegible] about September 6, and $200 [illegible] He had also bought a house in [illegible].

Rudnicki said he [illegible] the [illegible] reports. This was met by testimony [illegible] not made after the early part of 1942 and that [illegible] reports were in pen and ink. His claim that he used the [illegible] process daily reports for [illegible] was contradicted by [illegible]. He had testified in defense for Rudnicki. There was corroboration of only part of Rudnicki's testimony that he caused the lock on the door to be changed on more than one occasion and a panel replaced in the door to his office.

We believe we have recited enough on the salient features of the case to show that whatever disputes there were upon the facts, were for the jury to resolve. We find the jury was justified in finding Rudnicki guilty.

Rudnicki complains of error in the court's refusal to give an instruction naming Donna Peay and Geraldine Hunter, designating them as accomplices and stating the law on accomplice testimony. We believe given instructions No. 20 and No. 22 adequately informed the jury on the subject. This fact is sufficient to distinguish Hoyt v. People, 140 Ill. 588, relied on by Rudnicki, wherein the court said, "No other instruction was given calling the attention of the jury to the character of the evidence of accomplices * * *." The given instructions referred to were carelessly drawn in that the masculine pronouns "he", etc. are used almost exclusively and the only accomplices who testified were the girls. We think, however, that the jury knew from statements at the trial, arguments and observation that the instructions referred to Donna Peay and Geraldine Hunter. The court did not err in refusing to give defendant's offered instruction No. 20. It had a tendency to mislead. Given instruction No. 28 covered the subject matter of refused instruction No. 10. No error was committed in refusing defendant's offered instruction No. 6.

Rudnicki complains of given instructions. Instruction No. 2 simply described the elements of conspiracy and is not vulnerable to the attack that it omits the requirement of proof beyond a reasonable doubt. Instruction No. 3 states the requirement sufficiently. Instruction No. 4 does not assume the conspiracy, it begins with the word "If". Instruction No. 6 by use of the term "concur" and "aid in executing" states the necessity of participation by the defendants. Instruction No. 7 does not go outside the scope of the

We believe we have recited enough on the salient features of the case to show that whatever discrete there were upon the facts, were for the jury to resolve. We find the jury was justified in finding Rudnicki guilty.

Rudnicki complains of error in the court's refusal to give an instruction naming Donna Peck and Geraldine Hunter, designating them as accomplices and stating the law on accomplice testimony. We believe given instructions No. 20 and No. 28 adequately informed the jury on the subject. While that is sufficient to distinguish Hoyt v. People, 140 Ill. 588, relied on by Rudnicki, wherein the court said, "No other instruction was given affirming the attention of the jury to the character of the evidence of accomplices * * *." The given instructions referred to were correctly drawn in that the masculine pronouns "he", etc. are used almost exclusively and the only accomplices who testified were the girls. We think, however, that the jury knew from statements at the trial, arguments and observation that the instructions referred to Donna Peck and Geraldine Hunter. The court did not err in refusing to give redundant or cumulative instruction No. 20. It had a tendency to mislead. Given instructions No. 28 covered the subject matter of refused instruction No. 20. No error was committed in refusing defendant's refused instruction No. 8.

Rudnicki complains of given instructions. Instruction No. 1 simply described the elements of conspiracy and is not vulnerable to the attack that it omits the requirement of proof beyond a reasonable doubt. Instruction No. 3 states the requirement sufficiently. Instruction No. 4 does not use the conspiracy, it begins with the word "If". Instruction No. 6 by use of the term "concur" and "aid in executing" states the necessity of participation by the defendants. Instruction No. 7 does not go outside the scope of the

indictment. Strand Manufacturing Company was not a victim, but its name was used as an instrument. Instruction No. 13 required the jury to be convinced beyond a reasonable doubt of the "truth of the charge in the indictment, etc." The charge included participation by Rudnicki. Instruction No. 14 states that if the facts and circumstances are as consistent with innocence as with guilt, the jury should find the defendants not guilty. This is tantamount to the requirement that the proof be established beyond a reasonable doubt. Instruction No. 15 states that the defendant's guilt must be established as to exclude every other reasonable hypothesis that the evidence must carry with it a "reasonable certainty" of guilt and, "If it does little more than excite the supposition of guilt, etc." This instruction is not clear. It should not have been given, although we cannot say it prejudiced Rudnicki. Instruction No. 17 covered the law with reference to defendant's privilege of testifying or not. Rudnicki contends it was so drawn as to lead the jury to apply the same test to his testimony as to that of the accomplices Peay and Hunter. We cannot agree. The instruction on testimony of accomplices limited the general term "any other witness" used in this instruction. Given instruction No. 3 covered the same subject matter as refused instruction No. 18. Given instructions Nos. 20, 21 and 22 obviated the necessity of giving refused instruction No. 12.

Thirty-two instructions were given and instruction No. 27 told the jury that the instructions were to be considered as a series. We believe Rudnicki was not prejudiced in the giving of instructions.

Rudnicki complains of prejudice in the conduct of the trial. He says his cross-examination of Donna Peay was restricted so that he was unable to bring out discrepancies in her testimony and that of Geraldine Hunter with respect to a trip to Detroit. Both the State's Attorney and the attorney for Pelka, Rudnicki's co-

indictment. Strand Manufacturing Company was not a victim, but its name was used as an instrument. Instruction 16. If required the jury to be convinced beyond a reasonable doubt of the truth of the charge in the indictment, etc." The charge included participation by Rudnicki. Instruction No. 14 states that if the facts and circumstances are as consistent with innocence as with guilt, the jury should find the defendants not guilty. This is tantamount to the requirement that the proof be established beyond a reasonable doubt. Instruction No. 15 states that the defendant's guilt must be established so as to exclude every other reasonable hypothesis than the evidence must carry with it a "reasonable certainty" of guilt and, "If it does little more than excite the suspicion of guilt, etc." This instruction is not clear. It should not have been given, although we cannot say it prejudiced Rudnicki. Ante, [illegible] 6c. IV covered the law with reference to defendant's privilege of testifying or not. Rudnicki contends it was [illegible] the jury to apply the same test to his testimony as to that of the accomplices Perz and Hunter. We cannot agree. The instructions on testimony of accomplices limited the [illegible] "[illegible]" used in this instruction. Given Instruction No. 6 covered the same subject matter as refused Instruction No. 18. Given Instructions Nos. 20, 21 and 22 obviated the necessity of giving refused Instruction No. 19.

Thirty-two instructions were given and Instruction No. XV told the jury that the instructions were to be considered as a series. We believe Rudnicki was not prejudiced in the giving of instructions.

Rudnicki complains of prejudice in the conduct of the trial. He says his cross-examination of Donna Perz was restricted so that he was unable to bring out discrepancies in her testimony and that of Geraldine Hunter with respect to a trip to Detroit. Both the State's Attorney and the attorney for Polka, Rudnicki's co-

defendant, objected to the question which sought detailed information about the men whom the girls were to meet in Detroit. Sustaining the objections was not error. We find no harm to Rudnicki in other incidents related to the examination of witnesses and statements of State's Attorney.

Before adjournment, the second day of the trial, the court admonished the jury - "You must keep your minds free and open until that time. And if anybody attempts to talk to you or call you about it, if you receive a call on the phone from somebody you do not know, try and trace it. Call the State's Attorney's Office if anything happens." Upon objection, the court said: "All right, call me then," and the States Attorney added: "At your home". Upon further objection the court stated that the statement implied nothing, simply told the jurors not to discuss the case with anyone over the phone, but to take the names of anyone who called them and tell the court about it. A subsequent motion to withdraw a juror and declare a mistrial was denied. The record discloses no reason why the admonition was given to the jury. We do not approve the admonition in this case. The trial court should carefully guard against prejudice to defendants in criminal cases. In the state of the record before us, however, we cannot say that the jury was influenced by this charge.

The final point made is that the court committed error in fixing the minimum and maximum time to be served by Rudnicki. The jury's verdict fixed the punishment at imprisonment in the penitentiary and fixed Rucnicki's fine at $2,000. The court sentenced him to a term in the penitentiary of not less than 3 nor more than 5 years. The crime alleged is a misdemeanor (People v. Bain, 359 Ill. 455), but the punishment provided is imprisonment in the penitentiary not exceeding 5 years or a fine not exceeding $2,000, or both. (Chap. 38, par 139, Ill. Rev. Stats. 1943). Paragraph 803, Chap 38, Ill. Rev.

defendant, objected to the [illegible] which caused [illegible] about the men when the jury came to court in [illegible]. [illegible] the objections were not error. We find no error [illegible] other incidents related to the [illegible] of witnesses and [illegible] of counsel's arguments.

Before adjournment, the [illegible] admonished the jury - "You must keep [illegible] that time. And if anybody [illegible] it, if you receive a [illegible] they are from it. [illegible] happens." Then [illegible] the state's [illegible] the court [illegible] ignore not [illegible] take the name of [illegible] subsequent action [illegible] denied. The [illegible] to the jury. [illegible] trial were [illegible] in criminal [illegible]. In [illegible] we cannot say [illegible] the jury [illegible].

The final [illegible] fixing the minimum [illegible] to be [illegible]. The jury's verdict fixed [illegible] and fixed Montoya's [illegible]. The court sentenced him to [illegible] years in the penitentiary of not less than 6 nor more than 8 years. The crime alleged is a misdemeanor (People v. [illegible], 380 Ill. [illegible]), but the punishment provided is imprisonment in the penitentiary not exceeding 5 years or a fine not exceeding $[illegible], or both. (Chap. 38, par. 139, Ill. Rev. State, 1949). Thompson 806, Chap 38, Ill. Rev.

Stats. provides that any person adjudged guilty of a felony or other crime punishable by imprisonment in the penitentiary, etc. shall, except in cases not relevant here, be sentenced to the penitentiary, and the court imposing sentence shall fix the minimum and maximum limits or duration of imprisonment. Clearly, the court properly fixed the minimum and maximum in this case.

For the reasons given the judgment of the Criminal Court is affirmed.

AFFIRMED.

LEWE AND BURKE, JJ. CONCUR.

state, provides that any person adjudged guilty of a felony or other crime punishable by imprisonment in the penitentiary, etc., shall, except in cases not relevant here, be sentenced to the penitentiary, and the court imposing sentence shall fix the minima and maxima limits or duration of imprisonment. Clearly, the court properly fixed the minimum and maximum in this case.

For the reasons given the judgment of the Criminal Court is affirmed.

AFFIRMED.

LAWS AND BURKE, JJ., CONCUR.

63 NE 2d 671 1945

43160

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| LULU I. KNAUS, Appellant, | ) | APPEAL FROM |
| v. | ) | SUPERIOR COURT |
| M.R.C. FINANCE CORPORATION, a corporation, et al., Appellees. | ) | COOK COUNTY. |

327 I.A. 214

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a law suit based on an alleged conspiracy to defraud, seeking damages of $57,850.00. The original, second and third amended complaints were stricken on motion of defendants. The court in addition to striking the third amended complaint, ordered plaintiff's action dismissed and she has appealed from the order.

We shall take the well-pleaded allegations as true to test the sufficiency of the complaint. We shall not consider an Appellate Court opinion referred to in plaintiff's brief. It is not part of the complaint.

The complaint attempts to charge a conspiracy to defraud plaintiff of her tavern. The use of the words, "conspired", "contrived", "connived" and"confederated" are meaningless in pleadings unless specified by allegations of fact. Sulinski v. Humboldt & Wabansia Bldg. Corp., 315 Ill. App. 392. The gravamen of a civil conspiracy consists of the act or acts which constitute the unlawful object of the conspiracy. 15 C. J. S. 1035. These acts must be charged with the same particularity as though the conspiracy were not alleged. In this case, since plaintiff attempts to allege a conspiracy to defraud, acts showing the fraud complained of must be charged with particularity.

The substance of the complaint is that defendant "conspired", "confederated", "contrived" and "schemed" to obtain plaintiff's tavern by "injecting" Anderson into her confidence so that she would make him manager with control of receipts and disbursements;

by "arranging" to have him operate the business at a loss; by "urging" her to make a loan to pay an accumulation of tavern bills and to defray expenses for a Wisconsin trip in aid of the health of her husband who had been "plied" with liquor; by "inducing" her to make the loan, thereby further distressing her financially; by sending her "false reports" of the business which she relied upon; by "arranging" a default in a weekly payment on the chattel mortgage securing the loan; and by foreclosing the mortgage and selling the tavern fixtures following default in the mortgage payment.

The terms quoted are conclusions and do not state a case. There are no dates given and no facts to support the conclusions. There is no description of who "injected" Anderson into plaintiff's confidence, nor who "arranged" to have him operate at a loss, nor how these were accomplished. There is no explanation why she needed urging to borrow when the bills which had accumulated and her husband's health created a need for money. There is no explanation why she left the business in Anderson's hands after the business was operated at a loss and she knew it and had to borrow to cover it.

Plaintiff alleges the defendants represented to her that the tavern was operating at a loss. She does not say the representation was false, nor could she consistently under other allegations made. She alleges the tavern earned enough to pay the mortgage in full, yet she had to borrow to meet operating losses before the mortgage was placed. There is no explanation why defendants had to "arrange" a loss, if it was in existence.

There is no information about the "false reports" she relied upon. There is no reason shown why the Corporate Defendant should not have foreclosed after it loaned the money to plaintiff and default was made in payment of the mortgage securing the loan.

We have pointed out enough to show that the complaint did not allege fraud, (Sulinski v. Humboldt & Wabansia Bldg. Corp.) and was properly stricken. We also believe that the dismissal order was correct since plaintiff had ample opportunity to state a cause of action.

For the reasons given the order of the Superior Court is affirmed.

ORDER AFFIRMED.

LEWE AND BURKE, JJ. CONCUR.

43392

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| CLARA TRACHTENBERG, Appellant, v. HAROLD B. FUERSTENBERG, etc., et al., Appellees. | ) | APPEAL FROM SUPERIOR COURT COOK COUNTY. |



MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Plaintiff has sued her mother, brother and sister for an accounting of the assets of a partnership composed of the individual defendants. She claims that assets belonging to the estate of a deceased sister were wrongfully invested in the firm. On defendant's motion the trial court found that judgments in proceedings to discover assets in the Probate Court of Cook County were res judicata of the issues presented by the pleadings in this case. The complaint was, accordingly, dismissed and plaintiff has appealed.

Edith Fuerstenberg died November 16, 1942. The defendant Harold Fuerstenberg was made administrator of the estate on application of his mother Naomi Fuerstenberg. Plaintiff, Rose Meites, Florence Arbetman, Saul Fuerstenberg and the defendants were the only heirs. The inventory filed January 19, 1943 listed assets of $5,433.40. Petitions to discover assets of the estate were filed in the Probate Court July 15, 1943 on behalf of plaintiff, Mrs. Meites and Mrs. Arbetman. September 7, 1943 a supplemental inventory listed additional assets of $7,129.75.

In her complaint the plaintiff alleges that Edith Fuerstenberg prior to her death owned 10 shares of stock in Fuerstenberg and Co., a corporation, of which Harold Fuerstenberg

was president, Edith, Secretary and Treasurer, and they and their mother directors; that prior to her death Edith withdrew $30,000.00 from the Corporation and placed it in a safety deposit box maintained by Edith and the defendant Miriam jointly; that the morning after Edith's death, Miriam removed from the box the certificate representing the 10 shares of stock and the money; that January 4, 1943 the Corporation was dissolved and, thereafter, a partnership formed by the defendants; and that the money and stock certificate - neither of which belonged to her - were used by Miriam as an investment in the partnership. She asks for an accounting of the partnership business to determine what share rightfully belongs to the estate of Edith Fuerstenberg.

Defendants answered and in substance denied that Miriam removed "approximately $30,000.00" in money belonging to Edith from the safety deposit box, stated that the stock certificate was a gift to Miriam; denied that any money invested in the firm came from the safety deposit box or belonged to Edith; and denied that any assets of the firm belonged to the estate. Their affirmative defense, upon which the decree rests, is that the doctrine of res judicata applies to preclude plaintiff's action because the issues in the citation proceedings in the Probate Court were identical with those raised here and were decided in favor of defendants. Plaintiff's replication states that the answer in averring the affirmative defense does not recite the judgment of the Probate Court.

The court dismissed the complaint after finding the issues and parties in this cause were the same as those in the citation proceeding, and that both proceedings were based on the same cause of action.

Defendants say that because plaintiff in her replication does not deny that the issues, parties and cause of action are the

was president, Edith, Secretary and Treasurer, and they and their mother directors; that prior to her death Edith withdrew $30,000.00 from the Corporation and placed it in a safety deposit box maintained by Edith and the defendant Miriam jointly; that the morning after Edith's death, Miriam removed from the box the certificate representing the 10 shares of stock and the money; that in early 1962 the Corporation was dissolved and thereafter a partnership formed by the defendants; and that the money and the two certificates - neither of which belonged to her - were used by Miriam in an investment in the partnership. The prayer is a strengthening of the partnership business to determine what [illegible] belonged to the estate of Edith Tuerkheimer.

Defendants answered and in substance [illegible] that prior removal "approximately $30,000.00" in money belonging to Edith from the safety deposit box, she had [illegible] a gift to Miriam; denied the [illegible] from the safety deposit box or [illegible] any assets of the firm belonged to [illegible] defense, upon which [illegible] res judicata barrier to prosecuting [illegible] issues in the citation proceeding in the Probate [illegible] identical with those raised here and were decided in favor of defendants. Plaintiff's realization of [illegible] averring the affirmative defense does not vacate the judgment of the Probate Court.

The court dismissed the complaint after finding the issues and parties in this cause were the same as those in the citation proceeding, and that both proceedings were based on the same cause of action.

Defendants say that because plaintiff in her replication does not deny that the issues, parties and cause of action are the

same, the allegations underlying the affirmative defense must be taken as true. Plaintiff's reply does not deny the Probate Court judgments were entered. Defendant filed with its answer and as a part thereof, copies of the petitions in the citation proceedings. These exhibits control the allegations in the answer where they are in conflict.

The doctrine of res judicata was applied by the trial court as a complete bar to plaintiff's action.

In one of the citation proceedings Harold Fuerstenberg, as Administrator, was the only respondent and in the other Miriam Fuerstenberg was the sole respondent. In the instant action, in addition to Harold as Administrator, Harold, individually and Miriam and Naomi are joined as defendants. Moreover, Harold, individually, Miriam and Naomi are sued as partners as a means of obtaining an accounting from the firm. Plainly, there is no identity of parties in the Probate Court proceedings and the instant action.

Defendant relies on Healea v. Verne, 343 Ill. 325, 331, to support his claim that it is not necessary that all parties in the instant suit should have been parties to the citation proceeding. It was held in that case that where additional parties had no interest which could be affected by the litigation, application of the doctrine would not be defeated. Harold, individually, and Naomi Fuerstenberg have interests in the firm which can be affected in the instant action.

Since there is no identity of parties, the doctrine of res judicata is not applicable as an absolute bar to plaintiff's action. City of Chicago v. Partridge, 248 Ill. 442. We need consider no other point.

For the reasons given the decree of the Superior Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

LEWE AND BURKE, JJ. CONCUR.

43405

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| F. W. FISCHER,<br>Appellant,<br>v.<br>QUEEN HEDWIG'S POLISH NATIONAL CATHOLIC CHURCH OF CHICAGO, a religious corporation,<br>Appellee. | ) | APPEAL FROM<br>CIRCUIT COURT<br>COOK COUNTY. |



MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to enforce a mechanic's lien. Plaintiff, a licensed architect, claims that he was employed by defendant, through its Board of Trustees, to render services as architect and as superintendent of construction, for which defendant owes him and has refused to pay a balance of $748.37 and interest. The decree found that he had been paid $150.00 in full for his services as architect, was entitled to a lien for $200 for his other services and that the costs should be shared equally between the parties. Plaintiff has appealed. Defendant has filed no appearance or brief in this court.

The award of $200 for plaintiff's services as superintendent of construction is the precise amount he claimed for those services. The issue here revolves about the claim based upon his services as architect.

Plaintiff alleged he was engaged to render the services at an agreed fee of 1½ percent of the lowest bid received on the specifications. Defendant answered that the agreement was for $150.00.

After the Board of Trustees decided to construct the building, defendant's pastor on or about June 2, 1943, called upon plaintiff and discussed the project. June 4, plaintiff attended

a meeting of the defendant trustees, at which he was engaged to prepare the plans and specifications. Thereafter he and the pastor viewed a church in Gary and one in South Chicago as models. Plaintiff first prepared pencil sketches which were shown to the pastor and, pursuant to slight revisions suggested by the pastor's superior, prepared blue prints and specifications which were submitted to the Board. Plaintiff received $50 when he was engaged and $100 a few days after the plans were submitted to the Board.

July 20, 1943, after the plans were received by the trustees, plaintiff was engaged to take the bids and supervise construction. July 31, he advised the pastor that he had received oral bids for some contracts in excess of $31,000. On August 31, he submitted to the trustees two bids, one for $31,035.25 and one for $46,558. September 8, 1943, he received a letter from defendant's attorneys that he had been paid in full and should not take any plans or specifications. At the time of trial the building had not been constructed.

The issues were referred to a master in chancery who made findings and recommendations substantially the same as those contained in the decree.

Plaintiff argues first that he was entitled to 1½ percent of the low bid, despite the fact that the building contemplated was not erected. There is no finding that plaintiff was not entitled to a lien for architect's fees because the building was not constructed. We assume that the master and the trial court would have allowed plaintiff's lien for the amount of $150.00, though the building was not constructed, had the finding not also been made that plaintiff had been paid.

There is no merit to the complaint that no findings were made that the plans, were approved; that plaintiff was ready,

willing and able to proceed; and of defendant's arbitrary stoppage of the work. The first is implicit in the finding that plaintiff was entitled to $150.00 for making the plans, and that this sum was paid. The latter two are not relevant. Plaintiff is satisfied with the allowance made for his services in connection with the taking of the bids, and this is the only part of his fee which he says depended on the actual construction.

Plaintiff argues that the decree and the master's report are unsupported by, and against the manifest weight of, the evidence. The rule is that, where the master, and not the court, has heard the evidence, we are not limited to the inquiry whether the findings are against the manifest weight of the evidence, but may determine whether the decree was a proper one under the law and the evidence. Jones v. Koepke, 387 Ill.97.

The vital question is what agreement was made between the parties for plaintiff's fee for the preparation of the plans and specifications. The important relevant findings of fact are that plaintiff was hired under an agreed fee of $150 for preparation of the plans and that there was no agreement to pay him 1½ percent of the lowest bid.

Plaintiff testified unequivocally that his agreement for the preparation of the plans and specifications was 1½ percent of the lowest bid and that the $150 he received was on account of his final fee. The written receipts introduced in evidence show a payment of $50 on June 4 and a payment of $100 on July 21, and state that the respective payments are "on account".

Witness Wrnesien, recording secretary of defendant, testified that plaintiff's fee was to be 1½ percent of $10,000 which was to be the limit of the cost of the church. Witness September, testifying for defendant, stated that plaintiff said

his "fees would be $100 or $150 or thereabouts", and states that on July 20, Fischer asked for "the remainder of his retainer, $100." Both these witnesses testified that Fischer asked 1½ percent for each part of his services and September testified that plaintiff said his total fee would be "3 percent of the total cost of the church building". He also testified that the trustees wanted plaintiff to build within the limit of $10,000. The pastor said that plaintiff requested a fee of $150, based on the construction cost of $10,000 and that he wanted $300 in addition to the $150 to take bids and supervise construction. The pastor insists that the agreed construction limit was $10,000.

Written minutes of defendant's parish meetings were introduced in evidence. The minutes of May 2 reports a discussion of the proposed building and "estimated that we should try and build a church for about $10,000." June 2 minutes report the contacting of plaintiff and the possibility of getting contractors. June 4 minutes report discussion with plaintiff and state "we wanted to build within $10,000 limit"; that Fischer asked for part of the retainer as he would need money for paper, etc. and further said that the cost of the plans should not exceed "$100.00, or a little more", "based on his claim of 1½ percent of the cost of the building." July 20 minutes reported submission of the plans by plaintiff, discussing the permits and materials; the hiring of plaintiff "as agent and architect", "1½ percent as agent and 1½ percent as architect"; and plaintiff's request for $100.00, "total $150.00 to date". July 25 minutes report meeting with plaintiff and subcontractors and the showing of the plans to the congregation and the report by plaintiff that he had taken some bids. August 31st minutes report receipt of two bids from plaintiff of $46,558 and $31,035.25 and plaintiff's request "for $150 more as retainer", "$150.00 paid for plans, now he wants $150.00 for obtaining bids."

We think it is plain that when plaintiff was engaged on June 4 that the defendant's trustees had little definite knowledge of the exact kind and cost of the building contemplated. The minutes state that the discussion of June 4 was very short and that plaintiff said he could not give much information until he found out more details. Defendant probably at this time wished to keep the cost of the building within $10,000, but we see little room for a basis for the trustees understanding that plaintiff was to be limited to $150.00 for his fees as architect. The June 4 minutes stated that plaintiff told them he could not give a definite figure for fees, but based his claim on 1½ percent of the cost of the building. It is difficult to see how the trustees could have misunderstood, for the minutes and witnesses refer to payment to plaintiff as a retainer. Moreover, if his fee was to be based on the cost of construction, and they knew not the cost of construction, how could the definite figure of $150.00 be understood as the fee?

Defendant's sworn answer avers that when the $150 was paid plaintiff was informed that the payment was in full for all services unless the building was actually constructed. The first part of the averment is not borne out by the receipts given defendant by plaintiff, nor by the oral or minute references to "retainer", "1½ percent", payment "to date", etc. As to the latter part of the averment the master found against the defendant by awarding the plaintiff his lien for $200 for services performed after completing plans and specifications.

We think we have pointed out enough to show that there is no basis for the finding that defendant agreed to pay plaintiff $150 for the plans and specifications and no other sum. Furthermore, the finding that there was no agreement whereby plaintiff was to receive 1½ percent of the lowest bid as his fees for plans, is not proper on the evidence. There is no question at all, it seems to us,

We think it is plain that when plaintiff wrote on June 4 that the defendant's trustees had little or no knowledge of the exact kind and cost of the building contemplated, the minutes state that the discussion of June 4 was very brief and that plaintiff said he could not give such information until he found out more details. Defendants probably at this time wished to see the cost of the building within 10,000, but we see little room for a basis for the trustees understanding that plaintiff was to be limited to $150.00 for his fees as architect. Since the minutes stated that plaintiff [illegible] figure for fees, but based his [illegible] of the building. It is difficult to see [illegible] have misunderstood, for the minutes [illegible] to plaintiff as a reminder. However, if [illegible] on the cost of construction, [illegible] association, how could the [illegible] $150, [illegible] as the fee?

Defendant's trustees [illegible] said plaintiff was [illegible] services unless the building [illegible] part of the agreement [illegible] by plaintiff, nor by the oral or [illegible] "[illegible]", "1½ percent", percent "[illegible]", etc. [illegible] the agreement the matter from [illegible] the plaintiff his fees for $150 for services rendered after completing plans and specifications.

We think we have pointed out enough to show that there is no basis for the finding that defendant agreed to pay plaintiff $150 for the plans and specifications and no other sum. Furthermore, the finding that there was no agreement whereby plaintiff was to receive 1½ percent of the lowest bid as his fees for plans, is not proper on the evidence. There is no question at all, it seems to us,

that the agreement was for 1½ percent. The only question is whether the 1½ percent was to apply to the $10,000 limit or to the lowest bid.

We believe the evidence shows that regardless of what the pastor and trustees originally believed, probably before and certainly not later than the July 20 meeting when the plans were submitted and plaintiff was engaged as superintendent to take bids on construction, they knew the cost of the building would exceed $10,000. The pastor and plaintiff, following the June 4th meeting, saw the church in Gary which cost $18,000 in 1941. This figure was discussed between them, and at a later meeting according to the minutes. That church, however, had no parsonage and the pastor wanted the plans to include, in addition to the church, a six room parsonage for living quarters. On July 25, several subcontractors attended the meeting and promised to submit bids. July 31 the pastor was advised by plaintiff that the oral bids were totaling in excess of $31,000. All that time there had been no question or objection on behalf of the defendant. The pastor made no protest when he was advised of the amount of the oral bids, except perhaps to remark that they were high. It was not at this time that defendant's lawyer advised plaintiff not to take further bids. Plaintiff was permitted to proceed taking bids for another month until on August 31 he submitted to the trustees the bid of $46,558. It was only after this final act plaintiff received the September 8th letter telling him to take no bids.

We believe we have shown by a recital of the evidence above, that the decree rendered was not proper under the evidence. We have not had the benefit of defendant's version and argument. Under all the circumstances, we believe that in justice to plaintiff, the decree should be reversed in so far as it finds that plaintiff agreed to perform the architect's services for $150.00.

that the agreement was for 1½ percent. The only question is whether the 1½ percent was to apply to the $10,000 limit or to the lowest bid.

We believe the evidence shows that respondent or what the pastor and trustees originally believed, probably before and certainly not later than the July 20 meeting when the plans were submitted and plaintiff was engaged as superintendent to take bids on construction, they knew the cost of the building would exceed $10,000. The pastor and plaintiff, following the June 4th meeting, saw the church in early which cost $8,000 in 1941. This figure was discussed between them, the [illegible] minutes. That church, however, [illegible] wanted the plans to include, in addition to the church, a fully equipped parsonage for living quarters. On July [illegible] attended the meeting and informed [illegible] pastor was advised by plaintiff that [illegible] excess of $11,000. [illegible] objection on behalf of [illegible] when he was advised of the amount of [illegible] to remark that they were [illegible] anth's lawyer advised plaintiff not to [illegible] was permitted to proceed taking bids [illegible] August 31 be submitted to the trustees the bid of $8,[illegible]. It was only after this final act plaintiff received the [illegible] letter telling him to take no bids.

We believe we have shown by a preponderance of the evidence above, that the decree rendered was not proper under the evidence. We have not had the benefit of defendant's version and argument. Under all the circumstances, we believe that in justice to plaintiff, the decree should be reversed in so far as it finds that plaintiff agreed to perform the architect's services for $1500.00.

In view of this conclusion we shall also reverse the decree in so far as it divided the costs between the parties.

For the reasons given the decree of the Circuit Court is reversed and the cause is remanded with directions to that court to find that the agreement for plaintiff's services was made in accordance with the allegations of plaintiff's complaint and to award plaintiff a lien for the sum of $748.37 and to tax the cost of this proceeding against the defendant.

REVERSED AND REMANDED
WITH DIRECTIONS.

LEWE AND BURKE, JJ. CONCUR.

In view of this conclusion we shall also reverse the decree in so far as it divided the costs between the parties.

For the reasons given the decree of the Circuit Court is reversed and the cause is remanded with directions to that court to find that the agreement for plaintiff's services was made in accordance with the allegations of plaintiff's complaint and to award plaintiff a lien for the sum of $748.27 and to tax the cost of this proceeding against the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

LEWIS AND WHITE, JJ., CONCUR.

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| THE CENTURY INDEMNITY COMPANY, a corporation,<br><br>Appellee,<br><br>v.<br><br>BOARD OF EDUCATION OF THE CITY OF CHICAGO,<br><br>Appellant. | APPEAL FROM<br><br>CIRCUIT COURT<br><br>COOK COUNTY. |



MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The Century Indemnity Company, a corporation, filed a two count complaint in the Circuit Court of Cook County against the Board of Education of the City of Chicago. The first count alleged an account stated between Fred J. Tucker and defendant for $5,450, on which $1,000 had been paid, leaving a balance due of $4,450. An assignment of the account from Tucker to plaintiff was also alleged. The second count, as amended, is in the nature of a quantum meruit. It alleges that Tucker was employed, in an oral agreement, as an expert real estate witness in the case of Giddens, et al. v. Board of Education, Circuit Court General No. 35-C-16593, by the Board of Education at the request of its duly authorized agents; that the defendant agreed to pay Tucker the reasonable value of his services; that he rendered the services beginning February 14, 1936 and ending July 15, 1936; that such services were reasonably worth $5,450; that $1,000 was paid on account, leaving a balance of $4,450, which claim was assigned to plaintiff. Answering the first count, defendant denied that there was an account stated. Answering the second count, subsequent to the overruling of its motions to strike such count, defendant denied that Tucker was employed by it, or rendered any services as set forth in the complaint; denied that it owed any amount to

plaintiff; alleged that no official resolution or action of the Board was ever taken to employ Tucker; that such alleged hiring was illegal and void; alleged that no appropriation was ever adopted in the annual school budget with which to pay Tucker; and that any attempt to pay him would be illegal and void. In its reply to defendant's answer to the second count, plaintiff alleges that it neither admits nor denies the allegations as to no official resolution and no prior appropriation adopted in the school budget, and states that plaintiff has no knowledge and, therefore, neither admits nor denies said allegations, but denies that the said allegations are competent, relevant or material to the issues, and for a further reply plaintiff alleged that defendant is estopped from maintaining either or both defenses. Preliminary to the trial, and pursuant to defendant's notice, plaintiff filed a bill of particulars, stating that the alleged services rendered by Tucker to defendant were set forth in a certain statement to the Board of Education by Tucker dated December 4, 1936. A trial before the court without a jury resulted in a finding and judgment against defendant for $4,450. This appeal followed.

The City of Chicago in trust for the Use of Schools holds title to certain real estate for the Board of Education of the City of Chicago. This real estate was leased by the Board of Education to certain lessees, and by the terms of the leases a revaluation was periodically required for the purpose of fixing the rentals to be paid by the lessees. In 1935 the lessees disputed the valuations arrived at by the appraisers and filed a complaint for injunction in the Circuit Court of Cook County, entitled "Giddens, et al. v. Board of Education, General No. 35-C-16593", to contest this appraisal. A decree was entered favorable in the main to the contention of the Board and the complainants in that case appealed to this court, where it is now pending. The Board engaged Mr. John S. Hummer,

plaintiff, alleged that no official [illegible]
Board was ever taken to employ [illegible]
was illegal and void; alleged [illegible]
adopted in the annual school [illegible]
that any attempt to pay [illegible]
really to determine [illegible]
that it neither [illegible]
consideration [illegible]
and states [illegible]
[illegible] and other [illegible]
[illegible]
for a further [illegible]
from [illegible]
and [illegible]
particulars, [illegible]
to determine [illegible]
[illegible]
court without [illegible]
defendant for [illegible]

The City of [illegible]
title to certain [illegible]
of Chicago. [illegible]
to certain leases, and [illegible]
was [illegible] [illegible]
be paid by the lessees. In [illegible]
arrived at by the [illegible]
in the Circuit Court of Cook County, [illegible]
Board of Education, General No. [illegible], [illegible]
A decree was entered favorable in the [illegible] to the [illegible]
the Board and the complainants in that case appealed to this court,
where it is now pending. The Board employed Mr. John S. Miller,

since deceased, as its counsel in the litigation and the matter proceeded to trial. The question of the valuation of the real estate being involved, real estate experts were retained by the respective parties and testified as to the valuation of the property. The property is located on the west side of State Street, between Madison and Monroe Streets, in Chicago. Fred J. Tucker was a real estate expert of long experience. Mr. Richard S. Folsom, attorney for the defendant, requested Tucker to render services as an expert appraiser and adviser in the Giddens case. He was the first expert Mr. Folsom called upon and assisted him in selecting other expert appraisers for the defense of the case. In order to be acquainted with the case and prepare himself with knowledge of what was going on and properly advise the attorneys in the case, it was necessary that Mr. Tucker be present in court and watch the proceedings. Defendant maintains that Tucker was employed as an expert real estate witness. We agree with plaintiff that the record in the instant case does not show whether or not Tucker testified in the revaluation case.

In a deposition taken in the State of Maine, where Mr. Tucker then resided, he testified that at the time he was employed Mr. Folsom said to him: "We have another fight on here and I shall want you as a witness and expert in this case". He stated that at that time nothing was said as to the compensation he was to receive; that the revaluation case went to court; that he conferred with the attorneys; and that he attended court a number of days. He testified further that after his services were performed he prepared a statement in condensed form and submitted it to Mr. Folsom; that Mr. Folsom told him to "itemize it fully so as to cover it in detail, as the matter had to go up to the Board of Education and he wanted it in a detailed manner, as much as could possibly be done"; that

he, Tucker, prepared a statement, or bill, in greater detail; that on December 4, 1936 he delivered the bill to Mr. Folsom in the latter's office; and that at the time the bill was delivered Mr. Folsom did not make any objection thereto or any comment thereon. The bill was dated December 4, 1936. The first item is for services in the revaluation case beginning February 14, 1936, such service consisting of "preparation". The bill contains a total of 53 items, 29 of which are listed as conferences, and 23 as attendances in court, with a total charge of $5,450. The charge for "preparation" was $2,500 and for the conferences and attendances in court $2,950. At the foot of the bill appears the following: "$1,000 paid on this account July & August, 1938, F. J. T." Mr. Tucker testified further that "many times" after the submission of the bill on December 4, 1936 he requested payment; that Mr. Folsom, answering him, gave "different reasons at different times, principally that the matter had to go before the Board and he wasn't ready to present the bill as yet, but that he expected to do so in the near future"; that on July 27, 1938, Mr. Folsom gave him, Tucker, a check for $1,000; that at the time the check was delivered to him there was no discussion as to the amount that was due; and that at that time Mr. Folsom did not make any statement to him that his bill was "out of line". Answering the question: "When was the first time you learned that Mr. Folsom, or the defendant, questioned the amount you had coming?" Mr. Tucker answered: "In talking about bills in general - that other experts, as well as me, had been haunting Mr. Folsom's office continually for money - and Mr. Folsom said that the bills were all out of line and there would have to be some reduction made. That wasn't speaking of my bill any more than the bills of the others. He didn't criticize my bill only generally speaking, as I have outlined." In answering a question as to whether when the thousand dollar check was handed to him, Mr. Folsom made any statement, the witness said: "This

check was paid on account of the bill rendered." In answer to a question as to whether on or about November 1, 1940 or prior thereto he had a conversation with Mr. Folsom regarding the payment of his bill, he answered: "I did. I told him of the position - how badly I needed some money - and laid my cards on the table, with Mr. Folsom, which I was always free to do on account of his long friendship; and I asked him if there was a possibility of getting some money on my account. Mr. Folsom was very nice about it, and said he would make every effort to do so, but the Board was a large board and they wern't satisfied with the bills and he didn't know what he could do, but he was going to do everything he could for me in getting my money on this bill."

The check dated July 27, 1938, described as a warrant, is payable to the order of Fred J. Tucker for $1,000, charged to "Bond Service" and signed by the president, secretary and assistant secretary of the Board, and by the Mayor and Comptroller of the City of Chicago. It appears from the record of the proceedings that at a regular meeting held on July 22, 1938 the attorney for defendant presented the following report:

"Your attorney reports that certain lessees of the Board of Education lots on State Street began suit in July 1935 to enjoin payments of rents due from them and fixed under the appraisal of May 1935, and that said suits consolidated under the title Blanche Giddens et al., versus the Board of Education have been with some unavoidable interruptions on trial since that date. Your attorney further reports that in the defense of these suits is has been necessary to employ real estate experts to testify on behalf of the Board for the purpose of sustaining the valuations of the said lots in question as fixed by said appraisers; that among these experts thus employed are the following: Fred J. Tucker, Glenn E. Crawford, L. L. Sachs, Joseph W. Cremin, George S. Lurie. Your attorney further reports that the above named experts have satisfactorily done the work required from them in the trial of said suits and that they will continue said work, and will testify on behalf of the Board, and otherwise assist in its defense when trial is resumed in September. Your attorney further reports the said experts have asked for payments on account of said services performed, and that in his judgment and consideration the amount of work which has already been done by them in connection with the Board's defense it is fair and reasonable that payment of one thousand dollars should be made to each and all experts on account of services rendered in said lawsuits by Fred J. Tucker, Glenn. E.

Crawford, L. L. Sachs, Joseph W. Cremin, George S. Lurie. Your attorney therefore recommends that the aforesaid payments be made on account of services rendered in the suits consolidated under the title Blanch Giddens, et al., versus the Board of Education, No. 35 C 16593, Circuit Court of Cook County, Illinois, and that such payment should be charged to the Bond Service Fund, and be paid from monies now or hereafter accumulated in such Bond Service Fund in the hands of the Board."

The Board record of this meeting also shows that the recommendation of the attorney, which the Board describes as a "resolution", was declared to be the action of the Board by an affirmative vote of eight members, with none voting in the negative. Mr. Tucker stated that the amount charged in his bill constituted a fair and reasonable fee for his services. No testimony was offered by the defendant.

Defendant states that it is a body politic and corporate and has only such powers as are expressly granted by statute, or such as may be necessary to carry into effect a granted power and can exercise such powers only and exclusively at a meeting duly assembled and by a vote of the members; that no officer of the Board is empowered to enter into any contract whatsoever; that no promise or contract made by such a person can create any liability against the Board; that school moneys cannot be expended unless ordered by a majority vote of the entire membership of the Board; that contracts made in violation of the "Annual School Budget Law" are null and void; that plaintiff failed to prove an account stated; and that plaintiff failed to establish its damages by such proper evidence as would enable the court to ascertain the amount thereof to a reasonable degree of certainty. As there is a presumption that the judgment of the court is right, in summarizing the evidence we have set the same out in its aspect most favorable to plaintiff. There is no contention that the judgment is contrary to the manifest weight of the evidence. The Board of Education was engaged in a controversy with certain lessees concerning a revaluation of real estate owned by it. The litigation involving the revaluation was and is of great importance to those

concerned, including defendant. It became necessary for the respective parties to support their contentions by the hiring of so-called real estate experts. Mr. Tucker was a real estate expert of long experience and had previously been employed by the Board in a similar capacity. He was highly regarded by Mr. Folsom, attorney for the Board. The latter was responsible for the conduct of the law department of the Board and he conducted the negotiations for the hiring of the experts. There can be no doubt that in such capacity he retained Mr. Tucker and that the latter rendered valuable services. Addressing ourselves to the proposition as to whether defendant hired Mr. Tucker, we observe that it is not disputed that he did render the services required of him in the revaluation case; that he was consulted as to the hiring of other experts; that on December 4, 1936 he presented an itemized bill showing the amount of his claim; that at that time Mr. Folsom, who was thoroughly familiar with the services that had been rendered in connection with the revaluation case, told him he would submit it to the Board; and that on July 27, 1938 a payment of $1,000 was made to him. The itemized bill introduced in evidence was produced by defendant and shows thereon a notation that $1,000 was paid "on this account" in July and August, 1938, and is followed by the initials "F.J.T.", evidently the initials of Fred J. Tucker. A fair inference is that Mr. Folsom, at the time he handed over the check for $1,000, required this receipt. It is interesting to note that the receipt is on account and that at that time, at least between the attorney for the Board and Tucker, there was no dispute as to the balance. At a regular meeting of the Board held on July 22, 1938, the attorney reported that in the revaluation case, for the purpose of sustaining the valuations, he had employed four experts, among them Mr. Tucker; that the experts had "satisfactorily done the work required of them"; that they had requested payment on account of the services and that

concerned, including defendant. It became necessary for the respective parties to support their contentions by the hiring of so-called real estate experts. Mr. Tucker was a real estate expert of long experience and had previously been employed by the Board in a similar capacity. He was highly recommended by Mr. Tofson, attorney for the Board. The latter was responsible for the [illegible] of the law department of the Board and he conducted the [illegible] for the hiring of the experts. There [illegible] capacity be retained Mr. Tucker and [illegible] services. Addressing [illegible] defendant hired Mr. Tucker, [illegible] he did render the services required. [illegible] that he was connected [illegible] December 4, 1956 he presented an itemized bill [illegible] of his claim; that at that time Mr. Folsom, [illegible] familiar with the services that [illegible] the revaluation case, told him [illegible] that on July 27, 1956 a payment of [illegible] made to him. The itemized bill introduced in evidence [illegible] above thereon a notation that [illegible] "on account" in July and August, 1956, and is followed by an initial [illegible] evidently the initials of Fred C. Tucker. A [illegible] is Mr. Folsom, at the time he handed over the check for [illegible], received this receipt. It is interesting to note that the receipt is on account and that at that time, at least between the attorney for the Board and Tucker, there was no dispute as to the [illegible]. At a regular meeting of the board held on July 23, 1956, the attorney reported that in the revaluation case, for the purpose of sustaining the valuations, he had employed four experts, among them Mr. Tucker; that the experts had "satisfactorily done the work required of them"; that they had requested payment on account of the services and that

it was fair and reasonable that payment of $1,000 should be made to each on account of services rendered. The recommendation of Mr. Folsom was adopted by the Board. At that time no objection was made to the bill for $5,450 which had been presented by Mr. Tucker. We believe that it is a fair inference that men and women of the character of those who sit as trustees of the Board of Education would require the attorney to give them the facts on which he was making his recommendation, and that the attorney would have given such facts. We are of the opinion that on July 22, 1938 the Board was fully informed as to the services rendered by Tucker and as to his bill. By its action the Board approved the hiring of Tucker by Folsom. The evidence shows that when Folsom delivered the check for $1,000 to Tucker, he did not intimate to him that he questioned the integrity or fairness of the bill. After the receipt of the $1,000 Tucker continued to request payment of the balance and it was not until sometime later that Folsom said that the bills were out of line and there would have to be some reduction made. It is evident that Folsom was speaking of all the bills. We find that under the evidence Mr. Tucker was hired by authority of the Board of Education, and that in paying him the $1,000 the Board recognized the validity of the bill presented on December 4, 1936. We agree with plaintiff that the action of the Board justified the trial court in assuming that the necessary resolution of employment was passed, and that the necessary appropriation was made.

Defendant maintains that Tucker was not sufficiently explicit when testifying in setting out the time spent in conferences and in court; also that there are certain manifest errors or inaccuracies in the bill. At the time he was on the stand he was

it was fair and reasonable that [illegible] $1,000 [illegible] to each on account of services rendered. The [illegible] Mr. Folsom was adopted by the Board. [illegible] made to the bill for $6,480 which had been [illegible] by [illegible]. We believe that it is a fair [illegible] character of those who will be [illegible] would require the attorney to give [illegible] making his recommendation, and [illegible] such facts. [illegible] not fully informed as to [illegible] his bill. By its action [illegible] by Folsom. The evidence [illegible] for $1,000 to Tucker, [illegible] the integrity or fairness of the bill. [illegible] $1,000 under contract to [illegible] was not until [illegible] out of line and there would have [illegible] evident that Folsom's [illegible] under the evidence in Tucker [illegible] of [illegible], and that in [illegible] the validity of the bill [illegible] with plaintiff [illegible] the action of the [illegible] court in assuming that the necessary [illegible] passed, and that the necessary expenditure [illegible].

Falconburg relating that [illegible] explicit when testifying in setting [illegible] and in court; also that there are certain [illegible] inaccuracies in the bill. At the time [illegible]

not asked to explain the inaccuracies. Apparently, the attorney for the Board and the Board were satisfied with his services and the value he placed on them and recognized that it was the obligation of the Board to pay the bill which he presented. We are satisfied that plaintiff proved both counts of the complaint. Defendant asserts that an account stated has been defined as an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other. We agree that this is a correct definition. It is not necessary to prove the correctness of the separate items. We also agree with the rule urged by defendant that an account stated cannot be made the instrument to create an original liability and that it merely determines the amount of the debt where liability previously existed. At the time the Board directed the payment of $1,000 to Tucker he had performed all of the services for which he was hired and for which he submitted his bill. The record shows that Tucker had a legal claim on which to base an account stated.

Because of the views expressed, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. CONCURS.

LEWE, J. TOOK NO PART.

not asked to explain the inaccuracies. [illegible] for the Board and the Board [illegible] the value be placed on [illegible] of the Board to pay the bill [illegible] that plaintiff proved both [illegible] warrants that an account stated [illegible] between the parties to [illegible] between them [illegible] comparing the accounts, and [illegible] one or the other, [illegible] to not recover [illegible] be also [illegible] stated account [illegible] and that it [illegible] practically and it [illegible] $3,000 to Mosher [illegible] was signed and for which [illegible] that Mosher had [illegible]

Judgment of the [illegible]

Court of Cook County is affirmed.

FILED, [illegible]

LEWIS, J. [illegible]

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| JOSEPH E. HALLORAN,<br>Plaintiff - Appellee,<br>v.<br>CHICAGO & NORTH WESTERN RAILWAY COMPANY, a corporation,<br>Defendant - Appellant. | ) | APPEAL FROM<br>CIRCUIT COURT<br>COOK COUNTY.<br>30 326 I.A. 217 |

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An amended complaint filed in the Circuit Court of Cook County by Joseph E. Halloran against the Trustee of the Chicago & North Western Railway Company alleges that on March 10, 1943 he was working as a switchman in defendant's Grand Avenue yard; that by reason of such employment, the Federal Employers' Liability Act and Safety Appliance Act were applicable; that the crew of which he was a member operated a locomotive in a southerly direction on out-freight house track No. 1, coupled to freight cars on that track, then pulled the freight cars in a northerly direction; that acting as the head switchman, he was on the west side of the track to pass signals from the conductor to the engineer; that he was unfamiliar with the physical features of the yard and with the method of doing the work; that defendant's conductor determined to move the cars from track No. 1 on which they were standing to another part of the yard, but neglected to notify him what the movement was to be, and that in connection with the northward movement defendant was guilty of one or more of the following acts of negligence: (a) carelessly and negligently operated the cars in a northerly direction past a certain switch stand located at No. 4 switch; (b) carelessly and negligently and at a high and unreasonable speed operated the cars in a northerly direction past switch stand No. 4; (c) carelessly

and negligently failed to notify him that the cars were to be moved to a distant part of the yard, necessitating his riding the cars to that point, but, on the contrary, gave him a signal indicating that the cut of cars would be stopped immediately or a short distance beyond No. 4 switch, in which event he would be required to drop off near the switch so he could pass signals; that after he alighted near No. 4 switch, defendant's conductor negligently gave him a peremptory order to board the train, although the grab irons and stirrups he was required to use were coated with ice and the cars were moving at a high speed; (d) suddenly and unnecessarily accelerated the speed of the cars as he was attempting to board same; (e) negligently maintained the cars with defective and unsafe grab irons and stirrups in that the same became and remained covered with snow and ice; (f) negligently failed to furnish him with a reasonably safe place to work; (g) negligently failed to warn him, an inexperienced employee, of the operation of the movement and the physical features of the yard; and (h) negligently allowed a hole to be excavated and remain alongside the No. 4 switch at a point where employees would be likely to stumble and fall. The complaint further alleges that when plaintiff endeavored to board the moving train, in accordance with the order of the conductor, his foot slipped into the hole near the switch and he was thrown into the switch stand and his right leg was run over, requiring surgical amputation. Defendant, answering, denies the allegations of negligence and charges that the injuries of plaintiff were caused by his own carelessness and negligence. A trial before the court and a jury resulted in a verdict in favor of plaintiff in the amount of $35,000. At the request of defendant the court submitted special interrogatories, in answer to which the jury found that: (a) Plaintiff was not guilty of contributory negligence; (b) Defendant carelessly and

and negligently failed to notify him that [illegible] to a distant part of the yard, necessitating his return [illegible] to that point, but, on the contrary, [illegible] that the out of gauge would [illegible] beyond No. 4 switch, in which event [illegible] near the switch so as [illegible] near No. 4 switch, [illegible] peremptory order [illegible] cage he was [illegible] moving it [illegible] (c) [illegible] the speed of the car [illegible] negligently [illegible] and injuries in [illegible] and loss; (f) negligently [illegible] safe place to work; (g) negligently [illegible] licensed society, [illegible] failure of the [illegible] excavated [illegible] employees [illegible] allege that [illegible] in accordance with the [illegible] conductor, [illegible] the hole near the switch and [illegible] and his flight [illegible] over, resulting [illegible] defendant, meaning, besides the [illegible] that the injuries of plaintiff [illegible] and negligence. [illegible] trial before the court and jury [illegible] verdict in favor of plaintiff in the amount of [illegible] request of defendant the court instructed [illegible] in answer to which the jury found [illegible] guilty of contributory negligence; (b) Defendant [illegible]

negligently operated the cut of cars past the switch stand in question; (c) Defendant carelessly and negligently operated the cars past the switch stand at a high and unreasonable rate of speed; (d) Defendant did not suddenly accelerate the speed of the cars while plaintiff was trying to board them; (e) Defendant carelessly and negligently failed to exercise ordinary care to furnish plaintiff with a reasonably safe place to work; and (f) Defendant carelessly and negligently caused, suffered and permitted a hole or depression to be excavated and remain alongside the track. Motions by defendant for a directed verdict, for judgment notwithstanding the verdict, for a new trial and to set aside the answers to certain interrogatories were denied, and the court entered judgment on the verdict, to reverse which this appeal is prosecuted.

The mishap occurred in defendant's Grand Avenue yard in Chicago about 11:35 p.m., Wednesday, March 10, 1943. Plaintiff was then 39 years of age. He had worked for the defendant once before as a brakeman from 1917 to 1921, and also for the Belt Railroad, as well as for some other employers. He re-entered the employ of defendant on January 3, 1943, three months before he was hurt. For convenience, we will occasionally refer to the defendant (Trustee) as the railway company. At the time he was hurt, plaintiff was on the "extra board", meaning he had no regular run, but had to wait for a call. He worked on various jobs for defendant, but did his first work in the Grand Avenue yard on the night before the occurrence. He was hurt while on the second night's duty in that yard. The night he was hurt was dark and cold. During the day it had snowed, although it was not snowing at the time of the occurrence. The weather report shows that at 6:30 p.m. there were 2.6 inches of snow on the ground and that the temperature at 11:00 p.m. was 15 degrees. There were no flood lights in the yard and it was dark at the place of the occurrence. The snow did not come up over the

negligently operated the car [illegible] in question; (c) defendant negligently and [illegible] from the care that the [illegible] (d) Defendant [illegible] while plaintiff was [illegible] and negligently failed to [illegible] plaintiff [illegible] carefully [illegible] or driving [illegible] motions [illegible] attention [illegible] part in [illegible] or the vehicle [illegible]

The [illegible] Chicago [illegible] more than [illegible] before [illegible] fatigue; [illegible] employ [illegible] hurt, or [illegible] (Trustee) [illegible] was on the "[illegible]" [illegible] result [illegible] his first [illegible] occurrence. [illegible] The night he was [illegible] [illegible] noted, although it was not enough [illegible] occurrence. The weather report shows that at 6:00 p.m. there were [illegible] snow on the ground and the temperature at 11:00 p.m. was [illegible] degrees. There were no flood lights in the yard and it was dark at the place of the occurrence. The snow did not come [illegible] over the

rails. The Grand Avenue freight yard is west of the north branch of the Chicago River. In this yard the tracks run generally north and south and are numbered from east to west, the most easterly track being No. 1. Grand Avenue runs east and west and the portion traveled by the public passes over defendant's yard on an overhead viaduct. Immediately underneath the viaduct there is also a truck driveway which passes over defendant's tracks at grade level. On the east side of the tracks and adjacent thereto are two freight houses. One of these houses, called the old out-freight house, is immediately to the south of Grand Avenue, and the other house, known as the old in-freight house, is just to the north of Grand Avenue.

Plaintiff reported for work as head brakeman or switchman with the 11:00 p.m. Grand Avenue Diesel switch engine No. 1214. This engine was between 40 and 45 feet long and was headed south. The cab was at the back or north end of the engine and the engineer was stationed on the west side of the cab. Conductor Thomas Torkelson was in charge of the crew, which, in addition, consisted of Joseph J. Kelly, engineer, Richard Tansor, fireman, A. J. Stackowski, rear brakeman or switchman, and plaintiff. Although this was only the second night plaintiff had worked in that yard, he was an experienced brakeman and switchman. However, he was unfamiliar with that yard and the method and manner of conducting switching operations there. When plaintiff reported for work on the night of March 10, 1943 he went to the switch engine which was standing north of Grand Avenue and on a track opposite the old in-freight house. After making several preliminary switches near this freight house, he opened the switches necessary to bring the engine from the track alongside the in-freight house to track No. 1, located immediately west of the out-freight house. On bringing the engine over to out-freight house track No. 1, he made one mistake in throwing a switch, the engine had

rails. The Grand Avenue freight yard is west of the [illegible]
of the Chicago River. In this yard the tracks run [illegible]
and south and are numbered [illegible] to west, [illegible]
track being No. 1. Grand Avenue runs east and west [illegible]
traveled by the public passes [illegible]
viaduct. Immediately [illegible]
driveway which [illegible]
the east side of the [illegible]
houses. One of these [illegible]
immediately to the south of [illegible] Avenue, [illegible]
known as the [illegible]

[illegible]

with the 11:00 [illegible]
engine [illegible]
can use at the back or [illegible]
stationed in the yard [illegible]
was in charge of [illegible]
J. Kelly, engineer, [illegible]
brakeman or switchman, [illegible]
second night flagman [illegible]
between the switchers. [illegible]
and the method and manner of [illegible]
When flagman [illegible] for [illegible]
went to the switch engine which [illegible]
and on a track opposite the old in-freight house. [illegible]
several preliminary switches near this freight house, he [illegible]
the switches necessary to bring the engine from the track along side of
the in-freight house to track No. 1, located immediately west of the
out-freight house. On bringing the engine over to out-freight house
track No. 1, he made one mistake in throwing a switch, the engine had

to be backed up and the correct switch was then thrown. Standing on track No. 1 and spaced about 2 feet apart, and spotted at various openings in the old out-freight house were 9 freight cars to be picked up by the Diesel engine after being coupled together. The engine was headed south, which brought the engineer over on the west side of the track. The members of the crew were working on the west side and the signals were to be passed there. The conductor, Torkelson, who had the switching list showing definitely where each car was to be placed, apparently intended to couple the cars on that track, pull them out toward the north and distribute them to various other tracks in the yard. There were 2 cars next to the locomotive which were not to be switched. Of the 8 cars standing on No. 1 track, the northerly 7 were to be pulled out and the most southerly car was to be left. When the cars had been coupled and the engine started back north, 9 cars were being moved. When the coupling on track No. 1 was finished, plaintiff was about 2 or 3 car lengths south of the engine, the conductor was about an equal distance south of him, and Stackowski, the field man, was about 2½ car lengths south of the conductor. The signal to back out originated with Stackowski, who made the last coupling. This signal was relayed from Stackowski by the conductor and plaintiff in turn passed the signal to the engineer. The track just to the west of track No. 1 was track No. 2, and this track was full of box cars, and these box cars extended all the way past the out-freight house to a point just south of Grand Avenue. The cars on track No. 2 just barely cleared the crossover lead from track No. 1 leading to the Wells Street lead. The crossover lead ran in a northwesterly and southeasterly direction, permitting switching into various tracks in the yard. With freight cars standing on both tracks 1 and 2, the clearance between the freight trains was only about 2 feet. Conductor, Torkelson had the switching list, but no other

to be backed up and the correct switch was then thrown. Attaching on track No. 1 and spaced about 2 feet apart, and notched at various openings in the old out-freight house were 3 freight cars to be picked up by the Diesel engine after being coupled together. The engine was headed south, which brought the engineer over on the west side of the track. The members of the crew were working on the west side and the signals were to be passed there. The conductor, Torkelson, who had the switching list showing returning where each car was to be placed, apparently intended to couple the cars on the track, pull them out toward the north and distribute them in proper order there in the yard. There were 2 cars next to the locomotive which were not to be switched. Of the 3 cars at the south end, 1 there, the westerly 2 were to be pulled out and the most easterly car to be left. When the cars had been coupled and the engine started north, 3 cars were being moved. When the conductor, on track No. 1 was finished, plaintiff was about 3 or 4 car lengths south of the engine, the conductor was about an equal distance south of the, and therefore, the field man, was about 12 car lengths south of the conductor. He signal to back out originated with the conductor, and was to be coupling. This signal was relayed from the conductor to the conductor and plaintiff in turn passed the signal to the engineer. The track just to the west of track No. 1 was [illegible], and this track was full of box cars, and these box cars extended all the way past the out-freight house to a point just south of Grand Avenue. The cars on track No. 2 just barely cleared the crossover lead from track No. 1 leading to the Belle Street lead. The crossover lead ran in a north-westerly and southeasterly direction, permitting switching into various tracks in the yard. With freight cars standing on both tracks 1 and 2, the clearance between the freight trains was only about 2 feet. Conductor, Torkelson had the switching list, but no other

member of the crew was verbally told over just what switch the classification of the cars was to be done. Torkelson testified that when plaintiff came around on the front part of the engine and they coupled on to the first car standing on track No. 1, he told plaintiff, "We are going to switch this track."

There is some conflict in the evidence as to what kind of signals were given for the movement of the train. The jury, if it believed the testimony most favorable to plaintiff, could have found that Stackowski, who initiated the movement, gave an "ordinary" or slow backup signal, and that he expected that the train would stop so that the movement could be made over No. 3 switch. Torkelson testified that he received a signal a little bigger than an ordinary backup signal from Stackowski, which he passed on to the plaintiff. Defendant testified that he passed to the engineer a slow backup signal, and the engineer, in a deposition, stated that that was the signal he received. After passing the signal to the engineer, plaintiff got on the second or third car from the engine and rode out in a northerly direction. When the engineer received plaintiff's backup signal, he started the engine backward and pulled the cars out over the crossover lead. Plaintiff testified that when he got the conductor's signal and the movement started, he had no idea how far it was going; that it could have gone 10 or 15 feet; that as far as he knew it could have gone up past No. 3 switch or No. 4 switch, or up beyond either of them to clear the Wells Street lead. Switch No. 4 is 336 feet north of the old out-freight house. The switch for the Wells Street lead is about 201 feet north of switch No. 4. The Wells Street lead is the name for a track which crosses the north branch of the Chicago River at about Kinzie Street and comes in to Wells Street at the present site of the Merchandise Mart, formerly the site of the old North Western depot. Plaintiff stated that he knew that the movement would not come to a stop until a stop signal

member of the crew was verbally told over just what switch the classification of the cars was to be done. Jorgelson testified that when plaintiff came around on the front part of the engine he they coupled on to the first car standing on track No. 1, he said plaintiff, "we are going to switch this track."

There is some conflict in the evidence as to what kind of signals were given for the movement of the train. The jury, if it believed the testimony most favorable to plaintiff, could have found that Jorgelson, who initiated the movement, gave an "on board" or slow backing signal, and that he expected that the train would stop so that the movement could be made over safely. Jorgelson testified that he received a signal a little later than on the board backing signal from Jorgelson, which he acted on to plaintiff's injury. Defendant testified that the reason to the engineer slow backing signal, and the engineer, in a deposition, stated that he thought the signal he received. After passing the signal to the engineer, plaintiff got on the ground or half way from the car to the track and in a northerly direction. When the engine received plaintiff's signal, he started the engine backward and when the car had gone over the crossover load. Plaintiff testified that he relied on the conductor's signal. When the movement started, he was in a line by the was going; that it could have gone 10 or 15 feet, but he knew it could have gone up to track No. 2 switch or No. 3 switch, or up beyond either of them to clear the split switch. Switch No. 3 is 358 feet north of the old out-freight house. The switch for the Wells Street lead is about 201 feet north of switch No. 3. The Wells Street lead is the name for a track which crosses the north branch of the Chicago River at about Kinzie Street and comes in to Wells Street at the present site of the Merchandise Mart, formerly the site of the old North Western depot. Plaintiff stated that he knew that the movement would not come to a stop until a stop signal

was given. There was no definite information conveyed as to just which switch would be cleared by the south end of the movement before the movement was stopped and the classification started. After plaintiff relayed the backup signal, he boarded the train at the second or third car and rode on the west side of this car, standing on the stirrup and grasping one of the hand holds on the west side of the car. As he approached No. 4 switch, he got off because he believed that from that point he best could carry out his duties. After passing switch No. 4 and going out on the Wells Street lead, the engine would turn somewhat to the northeast so that the engineer on the west side of the train would be out of sight of the crew. It was necessary in order to make any further movements that some member of the crew place himself in a position where he could pass signals to the engineer. This could best be accomplished by dropping off near No. 4 switch and proceeding westerly across the tracks. If plaintiff did this, not only would he be in a position to pass signals to the engineer, but he could also throw switches or pull pins as required. Stackowski testified that this was the proper position for plaintiff to take for the movement which he believed was about to be made. Plaintiff alighted about 25 or 30 feet south of No. 4 switch. In order to keep the engine in view, he walked a short distance west and stood between the rails of track No. 5. Because of the curves that were being taken by the engine as it proceeded north, one instant the engineer would be in view of plaintiff and the next instant he would not be. The engineer was moving the cars at a speed estimated at between 5 and 10 miles an hour. One witness said the speed was closer to 10 miles per hour than to 5 miles per hour. Stackowski testified that the train picked up speed all the time. Plaintiff testified to the same effect. Plaintiff states that a speed of 5 or 6 miles an hour is the usual and customary speed in switching. Plaintiff testified further that he had no

was given. There was no definite information [illegible]
which switch would be closed by the south end of the [illegible]
before the movement was stopped and the [illegible]
plaintiff replied [illegible] he observed the [illegible]
second or third car [illegible] on the [illegible] side of [illegible]
on the siding [illegible] on the [illegible]
of the car. He [illegible] [illegible]
believed that from [illegible] [illegible]
after leaving switch [illegible]
the engine would [illegible]
on the west side of [illegible]
It was necessary [illegible]
member of the crew [illegible]
signals to the engineer. [illegible]
off near No. 4 switch [illegible]
plaintiff did [illegible]
signals [illegible]
ing as required. [illegible]
position for [illegible]
was about to be made. [illegible]
of No. 4 switch. [illegible]
short distance west [illegible]
because of the curve [illegible]
proceeded north, [illegible] the engineer would be in view [illegible]
and the next instant he would not be. The evidence [illegible]
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the time. Plaintiff testified to the same effect. Plaintiff admits
that a speed of 5 or 6 miles an hour is the usual and necessary
speed in switching. Plaintiff testified further that he had no

trouble in alighting from the train; that it was not snowing or raining; and that the weather had pretty well cleared up. When plaintiff rode north on the freight car from the out-freight house he noticed there was ice on the hand hold which he used, and when he alighted his hand slipped several times. He testified that the ice on the hand hold was about an inch high at the top of the grab iron, but that there was no ice at the bottom of the grab iron.

When plaintiff first alighted he was about a car length south of switch No. 4. As he stood near this switch, he could not see conductor Torkelson because the car standing on track No. 2 cut off his vision. In a few seconds, however, plaintiff could see a lantern which was held by Torkelson as he rode along on the west side of the fifth or sixth car. Plaintiff observed that switch stand No. 4 had a standard projecting vertically from the ground; that at the bottom of the switch there was a target consisting of a piece of steel with a red ball painted on it; and that above the target was a lighted lantern. The switch was one which is operated by hand. When the switch is closed, the light changes from green to red. As Torkelson rode by the place where plaintiff was standing, plaintiff testified he thought Torkelson was going to get off alongside of him. Instead, Torkelson said: "Get on, Joe. We are going all the way out." This was said by the conductor when he was abreast of and about 8 or 10 feet directly east of plaintiff. After Torkelson spoke to him, plaintiff walked from the middle of track No. 5 to a place between tracks No. 4 and 5 and then walked 10 or 12 feet north toward the switch. He stated that he did this because the cars were coming off the crossover lead on an angle and by walking 10 or 12 feet he could get on the car on the straight of way. A car or two had passed in the meantime and plaintiff attempted to climb on the rear end of the car behind Torkelson. He testified that he put his right hand on the second grab iron from the bottom; that he had his lamp in his

trouble in alighting from the train; that it was not snowing or raining; and that the weather had pretty well cleared up. When plaintiff rode north on the freight car from the out-freight house he noticed there was ice on the hand hold which he used, and when he alighted his hand slipped several times. He testified that the ice on the hand hold was about an inch high at the top of the grab iron, but that there was no ice at the bottom of the grab iron.

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hand; that he started to take a few steps in order to swing on to the train; that as he took these steps his glove started to slip on the ice on the grab iron; that it was taking him a few more steps than usual to get on; that on account of this condition he could not get hold; that every time he would grab his glove would slip; that just about the time he was to swing around and grab with the other hand to get on the car, the forward motion of the cars increased; that the draw bars pulled "as if the engineer was to increase his speed, and as he done that, as the cars pulled forward, it threw me off balance so that I never did get this hold on the grab iron;" that it threw him forward and he "stepped in this hole and hit this switch;" that the hole he testified about is "the depression south of No. 4 switch;" that he did not know at the time that there was a depression south of No. 4 switch, but knew it when he stepped into it; that he hit the lantern at the top of the switch with his left shoulder; that when he "came to" he was lying on the ground about 8 or 10 feet north of No. 4 switch; and that his right leg was crushed under the train, necessitating amputation. He testified that he did not stumble on anything; that when he tried to get on the car just before the mishap, it was not going too fast, but that it was the jerk of the train which increased the speed of the cars, so that after the increase in the speed it was going too fast. Plaintiff was immediately taken to Passavant Hospital, where it was found necessary to amputate his right leg about 6 inches below the knee. He remained there for 18 days, then returned home. He was later taken to Mercy Hospital, where he remained for a week and returned home again. He had not worked from the time of the occurrence until the trial. There is no claim that the stump is such that he cannot wear an artificial limb. His earnings while employed at the Belt Railroad were on the basis of $7.82 for 8 hours work and averaged $163.65 for 11 months, which

hand; that he started to take a few steps in order to swing on to the train; that as he took these steps his glove started to slip on the ice on the grab iron; that it was taking him a few more steps than usual to get on; that on account of this condition he could not get hold; that every time he would grab his glove would slip; that just about the time he was to swing around and grab with the other hand to get on the car, the forward motion of the car increased; that its throw came pulled "as if the engineer was to increase his speed, and he had done that", as the car pulled forward, it threw me off balance so that I never did get hold on the grab iron;" th t it threw him forward and he "stepped in this hole and hit this switch;" that the hole or trench was "the depression south of the switch;" that he did not know at the time that there was a depression south of the switch, but knew it when he stepped into it; that he hit the lantern at the top of the switch with his left shoulder; that when he "came to" he was lying on the ground about 5 or 10 feet north of the switch; and that his right leg was crushed under the trunk, necessitating amputation. He testified that he did not think anything; that when he tried to get on the car just before the mishap, it was not going too fast, but that it was the jerk of the train which increased the speed of the car, so that after the increase in the speed it was going too fast. Plaintiff was immediately taken to Passavant Hospital, where it was found necessary to amputate his right leg about 8 inches below the knee. He remained there for 13 days, then returned home. He was later taken to Mercy Hospital, where he remained for a week and returned home again. He had not worked from the time of the occurrence until the trial. There is no claim that the stump is such that he cannot wear an artificial limb. His earnings while employed at the Belt Railroad were on the basis of $7.82 for 8 hours work and averaged $183.85 for 11 months, which

was slightly less than he had earned doing clerical work for the Board of Election Commissioners. He testified that for the 2 months he worked for defendant his customary rate was $125 to $130 each 2 weeks. Medical and hospital bills incurred and paid by plaintiff were $235.

The drain referred to is for a catch basin located immediately south of switch No. 4. Starting about 15 feet south of this switch, there is a gradual downward slope that continues north to the switch, at which point the slope reaches the cast iron cover of a catch basin. The top of the catch basin is even with the bottom of the ties. This drain is approximately 4 feet wide and it is gradual from the west as well as from the south. Plaintiff testified that it was not an abrupt hole. The top of the catch basin cover is 7 inches below ground level. This catch basin is a part of the Grand Avenue drainage system, which consists of an underground tiled drainage with a number of catch basins and manholes for catching the water and also for cleaning out these sewers or drains. There are 9 catch basins of construction similar to the one at switch No. 4. These drains were constructed in accordance with defendant's standard printed specifications, which provide that the top of the catch basin shall be so placed that it will drain at least one inch below the bottom of the ties. Defendant's Division Engineer testified that from an engineering point of view it would not be feasible or practical to put drains underneath the ties and track, because it would not give proper support to the track, and it would not be accessible for cleaning purposes. Drainage would be necessary to keep the switches in operating condition. The drains at the switches had been there 40 years or more. Defendant's Exhibit 9 shows the switch and drain in question, approximately as it appeared on the night of the occurrence, with the depression entirely concealed by the snow.

was slightly less than he had e [illegible] for the
Board of Education Remsie School. He [illegible] for the [illegible]
be waived for deficiencies of [illegible] made [illegible]
2 years. Without the [illegible] in the [illegible] limit
were [illegible].

The main [illegible]
south of which [illegible]
there is a [illegible]
at which point the [illegible]
the top of the [illegible]
again in [illegible]
as well as [illegible]
[illegible] doors. [illegible]
ground level. [illegible]
system which [illegible]
number of [illegible]
also for [illegible]
of construction [illegible]
constructed in [illegible]
[illegible], which [illegible]
[illegible] that it will [illegible]
[illegible]. Community [illegible]
point of view it [illegible]
underneath the [illegible]
to the track, and it would not be [illegible]
Drainage would be necessary [illegible]
the lining at the [illegible]
Exhibit 9 shows the [illegible]
it appeared on the night of the conference, with the [illegible]
entirely concealed by the [illegible].

Defendant maintains that the judgment is wholly unsupported by the evidence. We agree with plaintiff that it is unnecessary for him to argue where the weight of the evidence lies, but only to point out where the evidence supporting his case may be found. In reviewing the record we accept as true the evidence in favor of plaintiff and give him the benefit of all favorable inferences that may reasonably be drawn therefrom. The case was submitted to the jury on seven charges of negligence. It is plaintiff's position that the mishap was caused by "one or more" of the acts of negligence charged. "The rights which the Act creates are federal rights protected by federal rather than local rules of law. * * * And those federal rules have been largely fashioned from the common law * * * except as Congress has written into the Act different standards." Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 352. The liability sought to be enforced is exclusively established by federal statutes. Sec. 51, Title 45, U. S. C. A., provides that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injury while so employed, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. In order to recover under the Federal Employers Liability Act it was incumbent upon plaintiff to prove that defendant was negligent and that such negligence was the proximate cause in whole or in part of the mishap. In Brady v. Southern Railway Co., 320 U. S. 476, the court said (484):

"Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury."

The Act abolished certain defenses which were recognized at common law in favor of an employer when sued for personal injuries received in the course of employment by the employee. Thus, it abolished the defense embodied in the fellow servant rule, the defense of contributory negligence and the defense of assumption of risk. The

Defendant contends that the judgment is directly unsupported by the evidence. He argues with plausibility that it is unnecessary for him to argue where the weight of the evidence lies, but only to point out where the evidence supporting [illegible] is lacking. In reviewing the record, we take the [illegible] plaintiff and give him the benefit of [illegible] may reasonably be drawn therefrom. [illegible] on seven charges of [illegible]. [illegible] that the mishap was caused by "[illegible]" or [illegible] "The rights which [illegible] federal rather than a local [illegible] have been [illegible] [illegible] <u>General Vermont [illegible], Inc.</u>, [illegible] enough to be [illegible] [illegible] 2d, 311, [illegible] by millions while [illegible] [illegible] in whole or in part [illegible] or employees of [illegible] due to its negligence, in [illegible] track, roadbed, [illegible] recover under the federal [illegible] upon plaintiff to prove in [illegible] negligence was the proximate [illegible] in Brady v. Southern Railway Co., [illegible] (1[illegible]

"Liability arises from negligence not [illegible] injury under this Act. And the negligence must be the proximate cause of the injury."

The Act abolished certain defenses which were once rules of common law in favor of an employer when sued for personal injuries received in the course of employment by the employee. Thus, it abolished the defense embodied in the fellow servant rule, the defense of contributory negligence and the defense of assumption of risk. The

right of recovery, however, must be predicated upon negligence. The Act was amended in 1939 by adding to Section 4 the provision that in an action brought by an employee, he shall not be held to have assumed the risks of his employment where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of the carrier. In a concurring opinion in Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, Mr. Justice Frankfurter said (71):

"The effect of this provision is to make it clear that, whatever other risks an employee may assume, he does not 'assume the risk' of the negligence of the carrier or its other employees. Once the negligence of the carrier is established, it cannot be relieved of liability by pleading that the employee 'assumed the risk.'"

In Union Pacific Railroad Company v. Hadley, 246 U. S. 330, Mr. Justice Holmes, speaking for the court, said (332):

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect."

In Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, the court said (354):

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York City, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The jury was instructed that if they found that plaintiff was entitled to a verdict for damages, and also found that a want of ordinary care on his part "contributed to cause his injury," then

in assessing damages they should first find the total amount of the damages he sustained by reason of his injuries and then find the proportion of the whole which was caused by his own negligence, then subtract the latter amount from the former and find the difference as the amount of the verdict. The United States courts have uniformly held that the burden of proving contributory negligence is on the defendant, and have enforced that principle even in trials in states which hold that the burden is on the plaintiff. Central Vermont Railway Co. v. White, 238 U. S. 507, 512. In the instant case, in answer to a special interrogatory, the jury found that plaintiff was not guilty of contributory negligence. The record supports this finding.

We turn to a consideration of the charge that defendant carelessly and negligently operated the cars and passed the switch stand at a high and unreasonable rate of speed. It will be recalled that in answer to a special interrogatory the jury found that this charge had been proved. In so finding the jury had a right to take into consideration the surrounding circumstances. There was a conflict in the evidence as to the speed of the train. We are convinced that there was evidence before the jury to justify the finding that under the circumstances the train was being negligently operated, passing the switch stand at a high and unreasonable rate of speed.

Paragraph 5(c) of the amended complaint charged that defendant failed to notify plaintiff that the cars were to be moved to a distant part of the yard and that plaintiff would be required to ride the cars thereto; that the signal given plaintiff indicated that the cars would be stopped a short distance beyond switch No. 4, which required plaintiff to alight near No. 4 switch; that after plaintiff had alighted, defendant carelessly gave him a peremptory order to board the train, although the grab irons were coated with ice and the cars were moving at a high and unusual speed. Plaintiff

in assessing damages may [illegible]
damage to antecedent [illegible]
proportion of the body which [illegible]
then subtract the latter amount from the [illegible]
difference is the amount [illegible]
have unfortunately held [illegible]
in on the "straws" [illegible]
in effect which [illegible]
Vermont Railway [illegible]
case, in answer to [illegible]
plaintiff [illegible]
support this view.

We turn [illegible]
carelessly and negligently [illegible]
stand [illegible]
that in order to [illegible]
charge has been [illegible]
into consideration [illegible]
in the evidence [illegible]
there was [illegible]
the circumstances the [illegible]
the switch stand [illegible]

Paragraph (6) [illegible]
defendant failed [illegible]
to a distant part [illegible]
vide the cars thereby [illegible]
that the cars would be stopped [illegible] switch No. 4,
which required plaintiff to climb over No. 4 switch; that after
plaintiff had alighted, defendant carelessly gave him a peremptory
order to board the train, although the grab irons were coated with
ice and the cars were moving at a high and unusual speed. Plaintiff

was a new man on the job, this being only the second night he worked in this yard. The conductor did not explain to him what he intended to do, further than to tell him they were going to switch No. 1 track. We are of the opinion that there was evidence to warrant the jury in finding that the order of the conductor directing plaintiff to board the train, under all the circumstances, constituted negligence, and that such negligence was the proximate cause of the mishap. We would not be justified in disturbing the jury's determination of this issue.

Defendant contends that the court erred in admitting in evidence defendant's Rule 7-A, which reads:

> "Employees giving signals must locate themselves so as to be plainly seen, and make them in such a manner as to be readily understood. The utmost care must be used to avoid taking a wrong signal, and unless positive a signal is for them, will not accept it until advised verbally. When signals from a trainman cannot be seen, train must be stopped immediately."

Defendant asserts that there was no violation of this rule in that it had no application to the situation existing when plaintiff was injured. Plaintiff states that the rule was not offered as a substantive ground of recovery, but as tending to prove negligent operation generally; also to show that plaintiff in getting off the train was required to do so in order to comply with the rule and keep the engineer in view. We agree with plaintiff that the evidence shows that a state of confusion existed in the minds of all the crew as to what was the purpose of the northerly movement during which he was injured, where they were going, and what they were going to do when they got there. Plaintiff thought they were going to pull out just clear of No. 4 switch and then throw some cars back on tracks No. 3 or 4. Stackowski, the field man, had the same understanding, or he would not have gotten off at No. 3 switch. The conductor, however, intended going down somewhere on the Wells Street lead "all the way out." Kelly, the engineer did not know what to do.

was a new man on the job, this being only the second night he worked in this yard. The conductor did not notify the engineer intended to do, further than to tell him they were going to switch No. 1 track. He was of the opinion that [illegible] the jury in finding that the order of the conductor in giving [illegible] cliff to board the train, under all the circumstances, [illegible] negligence, and that such negligence [illegible] of the [illegible] nating. We would not [illegible] in [illegible] mination of this issue.

Defendant [illegible]

evidence defendant's note 7-8, also [illegible]

"Employees [illegible] be plainly seen, and make [illegible] understood. The signal [illegible] signal, and unless qualified [illegible] it until advised verbally. [illegible] be seen, train must be stopped [illegible]"

Defendant asserts that there was [illegible] it had no specific time [illegible] injured. Plaintiff [illegible] substantive ground of recovery, but [illegible] operation generally; also [illegible] train was required to do so in order to [illegible] keep the engineer in view. [illegible] above that a state of confusion existed in the [illegible] as to what was the nature of the [illegible] was injured, where they were going, and what they were [illegible] when they got there. Plaintiff thought they were going [illegible] just clear of No. 4 switch and then throw [illegible] No. 3 or 4. Stachowski, the field man, had the same understanding, or he would not have gotten off at No. 3 switch. The conductor, however, intended going down somewhere on the belle [illegible] "all the way out." Kelly, the engineer did not know what to do.

He admitted he did not know where he was going, and that the disappearance of the signalman meant to stop. The engineer went 700 or 800 feet, or approximately 20 car lengths after he lost sight of plaintiff. The act imposed liability for injuries resulting in whole or in part from the negligence of the defendant. We agree with plaintiff that Rule 7-A was admissible because its violation was one of the contributing causes of the accident, and also as tending to prove negligent operation generally and to show that plaintiff, in getting off the train, was in the exercise of ordinary care.

Paragraph 5(a) charges that defendant suddenly and unnecessarily accelerated the speed of the cars as plaintiff attempted to board the train. In answer to an interrogatory the jury found that the defendant did not suddenly or unnecessarily accelerate the rate of speed of the cut of cars as plaintiff was attempting to board the train. We agree with defendant that plaintiff is bound by this finding. We are satisfied that there was evidence to warrant the jury in finding that defendant negligently failed to warn plaintiff, "an inexperienced employee," in that he was unfamiliar with the operation of defendant and the physical features of the ground and the manner in which the work was to be performed and dangers to which he was exposed. This charge presented a question of fact which the jury was competent to pass upon. Paragraph 5(h) charges that defendant carelessly permitted a hole or depression to remain alongside the track in the vicinity of No. 4 switch, where employees were liable to stumble and fall. We agree with defendant that the testimony shows that the drain was necessarily located in the yard and that it was placed there in the exercise of defendant's judgment on an engineering problem. Paragraph 5(e) charges that the defendant carelessly and negligently maintained the freight car in question "with defective, unsafe, unsecure and insufficient grab irons and stirrups, in that the same became and remained covered with snow and ice." The snow and ice on the grab irons came from the natural

He admitted he [illegible] knew where he was going, and [illegible] — [illegible] of the signalman [illegible] the train. [illegible] or 200 feet, or [illegible] plaintiff. [illegible] in whole [illegible] with [illegible] was [illegible] plaintiff [illegible] to.

[illegible] necessarily [illegible] to [illegible] until [illegible] the [illegible] board the train. [illegible] by this [illegible] the jury in finding [illegible] tiff. [illegible] the observation [illegible] and the [illegible] which [illegible] the jury [illegible] dence [illegible] side the track in the vicinity [illegible] more liable to [illegible] that the testimony above [illegible] and that it was placed there in the exercise of [illegible] judgment on an engineering problem. [illegible] carelessly and negligently maintained the freight car in question "with defective, unsafe, unsecure and insufficient grab irons and attirupe, in that the same became and remained covered with snow and ice." The snow and ice on the grab irons came from the natural

elements, over which defendant had no control. The presence of snow and ice on grab irons is not a violation of the Safety Appliance Act, nor is it in and of itself negligence. Paragraph 5(f) charges that defendant negligently failed to exercise ordinary care to furnish plaintiff a reasonably safe place to work. We agree with defendant that this charge is not sustained by the evidence.

At the close of all the evidence defendant moved for a directed verdict on each of the specific charges of misconduct contained in the complaint, and requested the court to give to the jury instructions relating to each of the sub-paragraphs. These instructions advised the jury that it could not find for plaintiff on the basis of the particular sub-paragraph because there was no evidence in support of it. With reference to sub-paragraph 5(e) the instruction requested by the defendant and marked No. 49 in the abstract was as follows:

> "Plaintiff's complaint in this case alleges that the defendant Thomson, Trustee, carelessly and negligently maintained said car with defective, unsafe, unsecure and insufficient grab irons and stirrups, in that the same became and remained covered with snow and ice. The plaintiff has failed to introduce any evidence at this trial to support that allegation of his complaint, and you will therefore, in considering your verdict, in no way base such verdict upon that charge or any such alleged negligence on the part of the defendant."

At the time the instructions relating to each of the sub-paragraphs were tendered to the court to be given on behalf of defendant, the court refused each of them, except No. 49, and the court then stated that this instruction would be given and it was marked "given". After the instructions were so marked by the court, the case was argued to the jury by the respective attorneys. All the instructions which had been marked "given" were read to the jury, except instruction No. 49. Counsel for defendant then called the court's attention to the fact that this instruction had not been read. After a colloquy as to whether the instruction should be given, the court decided not to give it. The argument to the jury is not in the record. The court instructed the jury on the issues. The complaint of course was not delivered to the jury and their only knowledge of the issues was gained from

[illegible]

the instructions. The charge of insufficient grab irons was omitted from the instructions and was not submitted to the jury as a substantive ground for recovery. Plaintiff did not claim, on the trial, that he could recover on that theory. The jury had the right to take into consideration the fact that the hand hold was covered with ice in determining whether defendant's conduct, viewed as a whole, was negligent. The jury was required to consider this fact along with the other attending circumstances in determining whether the order given to plaintiff to board the cars was negligent.

Defendant, by appropriate motion at the close of all the evidence and accompanied by an instruction, also asked that the charge of negligence contained in Paragraph 5(h) be taken from the jury. This paragraph charges that defendant carelessly suffered and permitted a hole or depression to be excavated and to remain alongside the track in the vicinity of No. 4 switch. We are of the opinion that this instruction should have been given and that this charge should have been withdrawn from consideration of the jury. There are cases in Illinois holding that where an improper or unproven issue is submitted to a jury and a general verdict is returned, such verdict is erroneous because it cannot be determined whether the verdict is based on the good count or the bad one. The issues under Paragraph 5(e) were not submitted to the jury and no verdict under that charge could have been returned. The jury answered three special interrogatories tendered by the defendant, specifically finding defendant guilty of three charges of negligence. We have held that there is evidence to sustain the finding of the jury that plaintiff was not guilty of contributory negligence, and that defendant carelessly and negligently operated the cut of cars past the switch stand at a high and unreasonable rate of speed. The court, therefore,

the instructions. The charge of insufficient real issues was omitted from the instructions and was not submitted to the jury [illegible] substantive ground for reversal. Plaintiff did not claim, on the trial, that he could recover on that theory. The jury was not asked to take into consideration the fact that [illegible] were, with his in determining whether defendants' conduct, viewed as a whole, was negligent. The jury was required to consider this fact along with the other [illegible] circumstances in determining whether the order given to plaintiff to board the car was [illegible].

Defendants, by [illegible] evidence and [illegible] charge of negligence [illegible] jury. The [illegible] and permitted [illegible] alongside the street in [illegible] solution that this instruction [illegible] charge should have been withdrawn from consideration [illegible]. There are cases in Illinois holding that [illegible] issue is submitted to a jury [illegible] such verdict is conclusive [illegible] the verdict is [illegible] under instructions which [illegible] under that theory could have been [illegible]. [illegible] special interrogatories [illegible] finding conclusive quality of these [illegible]. We have held that there is evidence to sustain the finding of the jury that plaintiff was not guilty of contributory negligence, and that defendants culpably and negligently operated the car at a speed and stand at a high and unreasonable rate of speed. The court, therefore,

is not driven to speculation as to the basis of the jury's verdict. Par. 192, Sec. 68, of the Civil Practice Act, (Par. 192, Sec. 68, Ch. 110, Ill. Rev. Stat. 1943) reads:

> "Whenever there are several counts in a complaint based on different demands, the court shall, on the demand of either party, direct the jury to find a separate verdict upon each. But if, in any case, there are several counts, and an entire verdict is rendered thereon, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts be sufficient to sustain the verdict."

With the special interrogatories answered in favor of plaintiff, and supporting the general verdict, the court acted properly in entering judgment on the verdict.

Finally, defendant urges that the verdict is excessive. We are of the opinion that the ends of justice will be served by requiring a remittitur of $10,000. The judgment of the Circuit Court of Cook County will be affirmed in the amount of $25,000, on plaintiff filing a remittitur of $10,000 within 10 days; otherwise, the judgment is reversed and the cause is remanded for a new trial.

JUDGMENT AFFIRMED UPON REMITTITUR OF $10,000; OTHERWISE, JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

LUPE AND KILEY, JJ. CONCUR.

is not driven to speculation as to the basis of the jury's verdict.

Par. 192, Sec. 58, of the Civil Practice Act, (Par. 192, Sec. 58, Ch. 110, Ill. Rev. Stat. 1943) reads:

"Whenever there are several counts in a complaint based on different demands, the court shall, on the demand of either party, direct the jury to find a separate verdict upon each. If, in any case, there are several counts, "or" in entire verdict is rendered thereon, the same shall not be set aside or reversed on the ground of any defective count, if the evidence be sufficient to sustain the verdict."

With the special interrogatories [illegible] and supporting the general verdict, the [illegible] in entering judgment on the verdict.

Finally, [illegible] we are of the opinion that the [illegible] requiring a restitution [illegible] of Rock County will be [illegible] title filing a restitution [illegible] judgment is reversed [illegible]

Lupe and Kilmer, Id. Cont.

43130

| | |
|---|---|
| JOSEPH E. HALLORAN,<br>Plaintiff - Appellee,<br>v.<br>CHICAGO & NORTH WESTERN RAILWAY COMPANY, a corporation,<br>Defendant - Appellant. | APPEAL FROM<br>CIRCUIT COURT<br>COOK COUNTY. |



ON REHEARING

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An amended complaint filed in the Circuit Court of Cook County by Joseph E. Halloran against the Trustee of the Chicago & North Western Railway Company alleges that on March 10, 1943 he was working as a switchman in defendant's Grand Avenue yard; that by reason of such employment, the Federal Employers' Liability Act and Safety Appliance Act were applicable; that the crew of which he was a member operated a locomotive in a southerly direction on out-freight house track No. 1, coupled to freight cars on that track, then pulled the freight cars in a northerly direction; that acting as the head switchman, he was on the west side of the track to pass signals from the conductor to the engineer; that he was unfamiliar with the physical features of the yard and with the method of doing the work; that defendant's conductor determined to move the cars from track No. 1 on which they were standing to another part of the yard, but neglected to notify him what the movement was to be, and that in connection with the northward movement defendant was guilty of one or more of the following acts of negligence: (a) carelessly and negligently operated the cars in a northerly direction past a certain switch stand located at No. 4 switch; (b) carelessly and negligently and at a high and unreasonable speed operated the cars in a northerly direction past switch stand No. 4; (c) carelessly and negligently

4210

JOSEPH A. MELLO et al.

Plaintiff - respondents,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, a corporation,

Defendant - appellant.

[illegible]

Cook County [illegible]

Ohio [illegible]

[illegible] be [illegible]

verdict that [illegible]

liability [illegible]

the crew of [illegible]

outbound [illegible]

freight car [illegible]

northerly direction; that [illegible]

the west side [illegible]

the engineer [illegible]

of the yard [illegible]

conductor [illegible]

they were [illegible]

notify him when [illegible]

with the northward movement [illegible]

of the following acts of negligence: (a) carelessly and [illegible]

operated the cars in a northerly direction [illegible]

stand located at No. 4 switch; (b) carelessly and negligently

and at a high and unreasonable speed operated the cars in a northerly

direction past switch stand No. 4; (c) carelessly and negligently

failed to notify him that the cars were to be moved to a distant part of the yard, necessitating his riding the cars to that point, but, on the contrary, gave him a signal indicating that the cut of cars would be stopped immediately or a short distance beyond No. 4 switch, in which event he would be required to drop off near the switch so he could pass signals; that after he alighted near No. 4 switch, defendant's conductor negligently gave him a peremptory order to board the train, although the grab irons and stirrups he was required to use were coated with ice and the cars were moving at a high speed; (d) suddenly and unnecessarily accelerated the speed of the cars as he was attempting to board same; (e) negligently maintained the cars with defective and unsafe grab irons and stirrups in that the same became and remained covered with snow and ice; (f) negligently failed to furnish him with a reasonably safe place to work; (g) negligently failed to warn him, an inexperienced employee, of the operation of the movement and the physical features of the yard; and (h) negligently allowed a hole to be excavated and remain alongside the No. 4 switch at a point where employees would be likely to stumble and fall. The complaint further alleges that when plaintiff endeavored to board the moving train, in accordance with the order of the conductor, his foot slipped into the hole near the switch and he was thrown into the switch stand and his right leg was run over, requiring surgical amputation. Defendant, answering, denies the allegations of negligence and charges that the injuries of plaintiff were caused by his own carelessness and negligence. A trial before the court and a jury resulted in a verdict in favor of plaintiff in the amount of $35,000. At the request of defendant the court submitted special interrogatories, in answer to which the jury found that: (a) Plaintiff was not guilty of contributory negligence; (b) Defendant carelessly and negligently operated the cut of cars past the switch stand in question; (c) Defendant

failed to notify him that the cars were to [illegible]
part of the yard, necessitating his riding [illegible]
but, on the contrary, gave him a signal to [illegible]
cars would be stopped immediately [illegible]
a switch, in which event he would [illegible]
switch so he could see it safely [illegible]
No. 4 switch, the defendant contended [illegible]
peremptory order to stand the [illegible]
affirmed in the judgment [illegible]
were valid at a high speed; ( ) [illegible]
accelerated the speed of [illegible]
same; (c) negligently [illegible]
yard large enough [illegible]
served with some [illegible]
with reason by [illegible]
from him, [illegible]
motorman [illegible]
allowed a hole [illegible]
switch at [illegible]
rail. The [illegible]
to force the moving [illegible]
conductor, the foot fell [illegible]
was thrown into the switch [illegible]
requiring surgical amputation [illegible]
allegations of negligence [illegible]
tiff were caused by his own [illegible]
trial before the court and a jury [illegible]
of plaintiff in the amount of $35,000. [illegible]
the court submitted special interrogatories, in answer to which
the jury found that: (a) Plaintiff was not guilty of contributory
negligence; (b) Defendant carelessly and negligently operated the
cut of cars past the switch stand in question; (c) Defendant

carelessly and negligently operated the cars past the switch stand at a high and unreasonable rate of speed; (d) Defendant did not suddenly accelerate the speed of the cars while plaintiff was trying to board them; (e) Defendant carelessly and negligently failed to exercise ordinary care to furnish plaintiff with a reasonably safe place to work; and (f) Defendant carelessly and negligently caused, suffered and permitted a hole or depression to be excavated and remain alongside the track. Motions by defendant for a directed verdict, for judgment notwithstanding the verdict, for a new trial and to set aside the answers to certain interrogatories were denied, and the court entered judgment on the verdict, to reverse which this appeal is prosecuted.

The mishap occurred in defendant's Grand Avenue yard in Chicago about 11:35 p.m., Wednesday, March 10, 1943. Plaintiff was then 39 years of age. He had worked for the defendant once before as a brakeman from 1917 to 1921, and also for the Belt Railroad, as well as for some other employers. He re-enetered the employ of defendant on January 3, 1943, three months before he was hurt. For convenience, we will occasionally refer to the defendant (Trustee) as the railway company. At the time he was hurt, plaintiff was on the "extra board", meaning he had no regular run, but had to wait for a call. He worked on various jobs for defendant, but did his first work in the Grand Avenue yard on the night before the occurrence. He was hurt while on the second night's duty in that yard. The night he was hurt was dark and cold. During the day it had snowed, although it was not snowing at the time of the occurrence. The weather report shows that at 6:30 p.m. there were 2.6 inches of snow on the ground and that the temperature at 11:00 p.m. was 15 degrees. There were no flood lights in the yard and it was dark at the place of the occurrence.

carelessly and negligently operated the [illegible] at a high and unreasonable rate of speed; (3) [illegible] suddenly accelerate the speed of the car [illegible] trying to board them; (4) [illegible] failed to exercise ordinary care [illegible] reasonably safe place to work; [illegible] negligently caused, [illegible] to be severely and [illegible] deformed [illegible] the verdict, for [illegible] certain interrogatories [illegible] on the verdict, to [illegible]

The [illegible] Chicago about [illegible] was then 20 years [illegible] before [illegible] Railroad, [illegible] the employ of defendant [illegible] was hurt. For convenience, [illegible] defendant (Trustee) [illegible] hurt, plaintiff was on the "extra" [illegible] regular run, but had to [illegible] job for defendant, but had her first was in [illegible] yard on the night before the occurrence. [illegible] second night's duty in that yard. The night is [illegible] cold. During the day it had snowed, although it was not snowing at the time of the occurrence. The weather report [illegible] 6:30 p.m. there were [illegible] inches of snow on the ground and that the temperature at 11:0 p.m. was 13 degrees. There were no flood lights in the yard and it was dark at the place of the occurrence.

The snow did not come up over the rails. The Grand Avenue freight yard is west of the north branch of the Chicago River. In this yard the tracks run generally north and south and are numbered from east to west, the most easterly track being No. 1. Grand Avenue runs east and west and the portion traveled by the public passes over defendant's yard on an overhead viaduct. Immediately underneath the viaduct there is also a truck driveway which passes over defendant's tracks at grade level. On the east side of the tracks and adjacent thereto are two freight houses. One of these houses, called the old out-freight house, is immediately to the south of Grand Avenue, and the other house, known as the old in-freight house, is just to the north of Grand Avenue.

Plaintiff reported for work as head brakeman or switchman with the 11:00 p.m. Grand Avenue Diesel switch engine No. 1214. This engine was between 40 and 45 feet long and was headed south. The cab was at the back or north end of the engine and the engineer was stationed on the west side of the cab. Conductor Thomas Torkelson was in charge of the crew, which, in addition, consisted of Joseph J. Kelly, engineer, Richard Tansor, fireman, A. J. Stackowski, rear brakeman or switchman, and plaintiff. Although this was only the second night plaintiff had worked in that yard, he was an experienced brakeman and switchman. However, he was unfamiliar with that yard and the method and manner of conducting switching operations there. When plaintiff reported for work on the night of March 10, 1943 he went to the switch engine which was standing north of Grand Avenue and on a track opposite the old in-freight house. After making several preliminary switches near this freight house, he opened the switches necessary to bring the engine from the track alongside the in-freight house to track No. 1, located immediately west of the out-freight house. On bringing the engine over to out-freight house track No. 1,

he made one mistake in throwing a switch, the engine had to be backed up and the correct switch was then thrown. Standing on track No. 1 and spaced about 2 feet apart, and spotted at various openings in the old out-freight house were 9 freight cars to be picked up by the Diesel engine after being coupled together. The engine was headed south, which brought the engineer over on the west side of the track. The members of the crew were working on the west side and the signals were to be passed there. The conductor, Torkelson, who had the switching list showing definitely where each car was to be placed, apparently intended to couple the cars on that track, pull them out toward the north and distribute them to various other tracks in the yard. There were 2 cars next to the locomotive which were not to be switched. Of the 8 cars standing on No. 1 track, the northerly 7 were to be pulled out and the most southerly car was to be left. When the cars had been coupled and the engine started back north, 9 cars were being moved. When the coupling on track No. 1 was finished, plaintiff was about 2 or 3 car lengths south of the engine, the conductor was about an equal distance south of him, and Stackowski, the field man, was about 2½ car lengths south of the conductor. The signal to back out originated with Stackowski, who made the last coupling. This signal was relayed from Stackowski by the conductor and plaintiff in turn passed the signal to the engineer. The track just to the west of track No. 1 was track No. 2, and this track was full of box cars, and these box cars extended all the way past the out-freight house to a point just south of Grand Avenue. The cars on track No. 2 just barely cleared the crossover lead from track No. 1 leading to the Wells Street lead. The crossover lead ran in a northwesterly and southeasterly direction, permitting switching into various tracks in the yard. With freight cars standing on both tracks 1 and 2, the clearance between the freight trains was only

he made one mistake in throwing a switch, the engine had to be backed up and the correct switch was then thrown. Standing on track No. 1 and spaced about 8 feet apart, and spotted at various openings in the old out-freight house were 5 freight cars to be picked up by the Diesel engine after being coupled to them. The engine was headed south, which brought the engineer over on the west side of the track. The members of the crew were working on the west side and the signals were to be passed there. The conductor, Torkelson, was between the switching line [illegible] where each car was to be placed, a particular [illegible] the car on that track, had been out to the [illegible] them to various other tracks in the yard. [illegible] to the locomotive which was not to be switched. [illegible] standing on No. 1 track, the northerly 7 cars to be [illegible] and the most southerly car was to be left. [illegible] coupled and the engine started back north. [illegible] When the coupling on track No. 1 was [illegible] 2 or 3 car lengths south of the engine, the [illegible] equal distance south of the [illegible] about 24 car lengths south of the [illegible] out originated with Stockowski, who made [illegible] signal was relayed from Stockowski by the [illegible] in turn passed the signal to the engineer. [illegible] west of track No. 1 was track No. 2, and [illegible] cars, and these box cars extended all the [illegible] house to a point just south of Grand Avenue. The cars on track No. 2 just barely cleared the crossover load from track No. 1 leading to the Wells Street load. The crossover load ran in a north-westerly and southeasterly direction, permitting switching into various tracks in the yard. With freight cars standing on both tracks 1 and 2, the clearance between the freight trains was only

about 2 feet. Conductor Torkelson had the switching list, but no other member of the crew was verbally told over just what switch the classification of the cars was to be done. Torkelson testified that when plaintiff came around on the front part of the engine and they coupled on to the first car standing on track No. 1, he told plaintiff, "We are going to switch this track."

There is some conflict in the evidence as to what kind of signals were given for the movement of the train. The jury, if it believed the testimony most favorable to plaintiff, could have found that Stackowski, who initiated the movement, gave an "ordinary" or slow backup signal, and that he expected that the train would stop so that the movement could be made over No. 3 switch. Torkelson testified that he received a signal a little bigger than an ordinary backup signal from Stackowski, which he passed on to the plaintiff. Defendant testified that he passed to the engineer a slow backup signal, and the engineer, in a deposition, stated that that was the signal he received. After passing the signal to the engineer, plaintiff got on the second or third car from the engine and rode out in a northerly direction. When the engineer received plaintiff's backup signal, he started the engine backward and pulled the cars out over the crossover lead. Plaintiff testified that when he got the conductor's signal and the movement started, he had no idea how far it was going; that it could have gone 10 or 15 feet; that as far as he knew it could have gone up past No. 3 switch or No. 4 switch, or up beyond either of them to clear the Wells Street lead. Switch No. 4 is 336 feet north of the old out-freight house. The switch for the Wells Street lead is about 201 feet north of switch No. 4. The Wells Street lead is the name for a track which crosses the north branch of the Chicago River at about Kinzie Street and comes in to Wells Street at the present site of the Merchandise Mart, formerly the site of the old North Western depot. Plaintiff stated that he knew that the movement would not come to a stop until a stop signal was given.

about 2 feet. Conductor Torkelson had the switching list, but no other member of the crew was verbally told over just what switch the classification of the cars was to be done. Torkelson testified that when plaintiff came around on the front part of the engine and they consulted on to the first [illegible] on track No. 1, he told plaintiff, "I was going to switch this train."

There is some conflict in the evidence as to what kind of signals were given for the [illegible] of the train. [illegible] if it believed the testimony [illegible] "[illegible]", could have found that [illegible], [illegible] "ordinary" or slow [illegible] train would stop so that [illegible] switch. Torkelson testified [illegible] bigger than an ordinary [illegible] passed on to the plaintiff. [illegible] to the engineer a slow [illegible] deposition, [illegible] passing the signal to the engineer, [illegible] third car from the engine [illegible] When the engineer received [illegible] engine backward [illegible] the movement started, he had no [illegible] could have gone 10 or 15 feet; that [illegible] have gone up part No. 3 switch or [illegible] of them to clear the Belle Street [illegible] north of the old out-freight house. The switch for the Belle Street lead is about 201 feet north of switch No. 4. The Belle Street lead is the name for a track which crosses the north branch of the Chicago River at about Kinzie Street and comes in to Belle Street at the present site of the Merchandise Mart, formerly the site of the old North Western depot. Plaintiff stated that he knew that the movement would not come to a stop until a stop signal was given.

There was no definite information conveyed as to just which switch would be cleared by the south end of the movement before the movement was stopped and the classification started. After plaintiff relayed the backup signal, he boarded the train at the second or third car and rode on the west side of this car, standing on the stirrup and grasping one of the hand holds on the west side of the car. As he approached No. 4 switch, he got off because he believed that from that point he best could carry out his duties. After passing switch No. 4 and going out on the Wells Street lead, the engine would turn somewhat to the northeast so that the engineer on the west side of the train would be out of sight of the crew. It was necessary in order to make any further movements that some member of the crew place himself in a position where he could pass signals to the engineer. This could best be accomplished by dropping off near No. 4 switch and proceeding westerly across the tracks. If plaintiff did this, not only would he be in a position to pass signals to the engineer, but he could also throw switches or pull pins as required. Stackowski testified that this was the proper position for plaintiff to take for the movement which he believed was about to be made. Plaintiff alighted about 25 or 30 feet south of No. 4 switch. In order to keep the engine in view, he walked a short distance west and stood between the rails of track No. 5. Because of the curves that were being taken by the engine as it proceeded north, one instant the engineer would be in view of plaintiff and the next instant he would not be. The engineer was moving the cars at a speed estimated at between 5 and 10 miles an hour. One witness said the speed was closer to 10 miles per hour than to 5 miles per hour. Stackowski testified that the train picked up speed all the time. Plaintiff testified to the same effect. Plaintiff states that a speed of 5 or 6 miles an hour is the usual and customary speed in switching. Plaintiff testified further that he had no trouble in alighting from the train;

that it was not snowing or raining; and that the weather had pretty well cleared up. When plaintiff rode north on the freight car from the out-freight house he noticed that there was ice on the hand hold which he used, and when he alighted his hand slipped several times. He testified that the ice on the hand hold was about an inch high at the top of the grab iron, but that there was no ice at the bottom of the grab iron.

When plaintiff first alighted he was about a car length south of switch No. 4. As he stood near this switch, he could not see conductor Torkelson because the car standing on track No. 2 cut off his vision. In a few seconds, however, plaintiff could see a lantern which was held by Torkelson as he rode along on the west side of the fifth or sixth car. Plaintiff observed that switch stand No. 4 had a standard projecting vertically from the ground; that at the bottom of the switch there was a target consisting of a piece of steel with a red ball painted on it; and that above the target was a lighted lantern. The switch was one which is operated by hand. When the switch is closed, the light changes from green to red. As Torkelson rode by the place where plaintiff was standing, plaintiff testified he thought Torkelson was going to get off alongside of him. Instead, Torkelson said: "Get on, Joe. We are going all the way out." This was said by the conductor when he was abreast of and about 8 or 10 feet directly east of plaintiff. After Torkelson spoke to him, plaintiff walked from the middle of track No. 5 to a place between tracks No. 4 and 5 and then walked 10 or 12 feet north toward the switch. He stated that he did this because the cars were coming off the crossover lead on an angle and by walking 10 or 12 feet he could get on the car on the straight of way. A car or two had passed in the meantime and plaintiff attempted to climb on the rear end of the car behind Torkelson. He testified that he put his right hand on the second grab iron from the bottom;

that it was not snowing or raining; and that the weather had pretty well cleared up. When plaintiff came north on the freight car from the out-freight house he noticed that there was ice on the hand hold which he used. He when he slipped his hand slipped several times. He testified that the ice on the hand hold was about an inch high at the top of the hand iron, but that there was no ice at the bottom of the grab iron.

When plaintiff [illegible] about [illegible] car length south of switch No. 6. As he stood near the switch, he could not see conductor Torkelson because the car [illegible] switch No. 8 cut off his vision. In a few seconds, however, plaintiff could see a lantern which was held by Torkelson as he rode along on the west side of the [illegible] car. [illegible] switch stand No. 4 and a standard [illegible] fly from the ground; that at the bottom of the switch there was a [illegible] of a piece of wood with a red [illegible] on it; that when the target was a lighted lantern. The switch was operated by hand. When the switch is closed, the light shows from green to red. As Torkelson came up to the [illegible] was standing, plaintiff [illegible] the target [illegible] to get off alongside of him. Lantern, Torkelson said "Get on, Joe. We are going all the way out." [illegible] conductor was behind about 2 or 10 feet [illegible] plaintiff. After Torkelson spoke to him, plaintiff [illegible] from the middle of track No. 3 to a place between tracks No. 4 and 6 and then walked 10 or 12 feet north toward the switch. He stated that he did this because the cars were coming off the crossover load on an angle and by walking 10 or 12 feet he could get on the car on the straight of way. A car or two had passed in the meantime and plaintiff attempted to climb on the rear end of the car behind Torkelson. He testified that he put his right hand on the second grab iron from the bottom;

that he had his lamp in his hand; that he started to take a few steps in order to swing on to the train; that as he took these steps his glove started to slip on the ice on the grab iron; that it was taking him a few more steps than usual to get on; that on account of this condition he could not get hold; that every time he would grab his glove would slip; that just about the time he was to swing around and grab with the other hand to get on the car, the forward motion of the cars increased; that the draw bars pulled "as if the engineer was to increase his speed, and as he done that, as the cars pulled forward, it threw me off balance so that I never did get this hold on the grab iron"; that it threw him forward and he "stepped in this hole and hit this switch"; that the hole he testified about is "the depression south of No. 4 switch"; that he did not know at the time that there was a depression south of No. 4 switch, but knew it when he stepped into it; that he hit the lantern at the top of the switch with his left shoulder; that when he "came to" he was lying on the ground about 8 or 10 feet north of No. 4 switch; and that his right leg was crushed under the train, necessitating amputation. He testified that he did not stumble on anything; that when he tried to get on the car just before the mishap, it was not going too fast, but that it was the jerk of the train which increased the speed of the cars, so that after the increase in the speed it was going too fast. Plaintiff was immediately taken to Passavant Hospital, where it was found necessary to amputate his right leg about 6 inches below the knee. He remained there for 18 days, then returned home. He was later taken to Mercy Hospital where he remained for a week and returned home again. He had not worked from the time of the occurrence until the trial. There is no claim that the stump is such that he cannot wear an artificial limb. His earnings while employed at the Belt Railroad were on the basis of $7.82 for 8 hours work and averaged $163.65 for 11 months, which was slightly less than he had earned doing clerical work for the Board of Election Commissioners

that he had his lamp in his hand; that he stepped back a few steps in order to swing on to the train; that as he took the [illegible] his glove started to slip on the ice on the metal iron; that it was taking him a few more steps than usual to get on; that in consequence of this condition he could not act normally; that every time he would [illegible] his glove would slip; that just during the time he was trying [illegible] and grab with the [illegible] on the car, the [illegible] of the cars increased; that the [illegible] was to increase his speed, [illegible] forward, it threw me off balance [illegible] on the grab iron"; that it threw him [illegible] this hole and hit this [illegible]"; [illegible] "the depression south of [illegible]"; [illegible] that there was a depression [illegible] when he stepped into it; that [illegible] switch with his left shoulder; that [illegible] on the ground about [illegible] his right leg was crushed under [illegible] He testified that he did not [illegible] to get on the car just before the [illegible] but that it was the jerk of the [illegible] the case, so that after the increase in the speed it was [illegible] fact. Plaintiff was immediately taken to Deaconess Hospital, where it was found necessary to amputate his right leg [illegible] below the knee. He remained there for 18 days, then returned home. He was later taken to Mercy Hospital where he remained for a week and returned home again. He had not worked from the time of the occurrence until the trial. There is no claim that the claim is such that he cannot wear an artificial limb. His earnings while employed at the Belt Railroad were on the basis of $2.88 for 8 hours work and averaged $183.65 for 11 months, which was slightly less than he had earned doing clerical work for the Board of Election Commissioners.

He testified that for the 2 months he worked for defendant his customary rate was $125 to $130 each 2 weeks. Medical and hospital bills incurred and paid by plaintiff were $235.

The drain referred to is for a catch basin located immediately south of switch No. 4. Starting about 15 feet south of this switch, there is a gradual downward slope that continues north to the switch, at which point the slope reaches the cast iron cover of a catch basin. The top of the catch basin is even with the bottom of the ties. This drain is approximately 4 feet wide and it is gradual from the west as well as from the south. Plaintiff testified that it was not an abrupt hole. The top of the catch basin cover is 7 inches below ground level. This catch basin is a part of the Grand Avenue drainage system, which consists of an underground tiled drainage with a number of catch basins and manholes for catching the water and also for cleaning out these sewers or drains. There are 9 catch basins of construction similar to the one at switch No. 4. These drains were constructed in accordance with defendant's standard printed specifications, which provide that the top of the catch basin shall be so placed that it will drain at least one inch below the bottom of the ties. Defendant's Division Engineer testified that from an engineering point of view it would not be feasible or practical to put drains underneath the ties and track, because it would not give proper support to the track, and it would not be accessible for cleaning purposes. Drainage would be necessary to keep the switches in operating condition. The drains at the switches had been there 40 years or more. Defendant's Exhibit 9 shows the switch and drain in question, approximately as it appeared on the night of the occurrence, with the depression entirely concealed by the snow.

Defendant maintains that the judgment is wholly unsupported by the evidence. We agree with plaintiff that it is unnecessary for him to argue where the weight of the evidence lies, but only

He testified on [illegible] for the [illegible]
customary rate was [illegible]
bills incurred and [illegible]

[illegible]
south of [illegible]
there is a [illegible]
at which point the [illegible]
basin. [illegible]
[illegible]
from [illegible]
it was not [illegible]
[illegible]
Avenue [illegible]
[illegible]
water and [illegible]
[illegible]
These drains were [illegible]
[illegible]
main shell [illegible]
the bottom [illegible]
that from [illegible]
[illegible]
would not [illegible]
[illegible]
keep the [illegible]
had been [illegible]
[illegible]
night of the [illegible]
the [illegible]

Defendant maintains that the judgment in [illegible]
by the evidence. We agree with plaintiff that it is unnecessary
for him to argue where the weight of the evidence lies, and [illegible]

to point out where the evidence supporting his case may be found. In reviewing the record we accept as true the evidence in favor of plaintiff and give him the benefit of all favorable inferences that may reasonably be drawn therefrom. The case was submitted to the jury on seven charges of negligence. It is plaintiff's position that the mishap was caused by "one or more" of the acts of negligence charged. "The rights which the Act creates are federal rights protected by federal rather than local rules of law. * * * And those federal rules have been largely fashioned from the common law * * * except as Congress has written into the Act different standards." Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 352. The liability sought to be enforced is exclusively established by federal statutes. Sec. 51, Title 45, U. S. C. A., provides that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injury while so employed, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. In order to recover under the Federal Employers Liability Act it was incumbent upon plaintiff to prove that defendant was negligent and that such negligence was the proximate cause in whole or in part of the mishap. In Brady v. Southern Railway Co., 320 U.S. 476, the court said (484):

> "Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury."

The Act abolished certain defenses which were recognized at common law in favor of an employer when sued for personal injuries received in the course of employment by the employee. Thus, it abolished the defense embodied in the fellow servant rule, the defense of contributory negligence and the defense of assumption of risk. The right of recovery, however, must be predicated upon negligence. The act

to point out where the evidence supporting his case may be found. In reviewing the record we accept as true the evidence in favor of plaintiff and give him the benefit of all favorable inferences that may reasonably be drawn therefrom. The case was submitted to the jury on seven charges of negligence. It is plaintiff's contention that the minors were caused by "one or more" of the acts of negligence charged. "The rights which [illegible] adequate rights protected by federal carriers than local rules of law. [illegible] and these federal rules have been largely [illegible] from the common law except as Congress [illegible] to the [illegible] employees." Bailey v. Central Vermont R. Co., [illegible] 349, 350. The liability except [illegible] and by [illegible] statutes. Sec. 51, Title 45, U. S. C. A., [illegible] carrier by railroad while [illegible] in interstate commerce shall be liable in damages to any person suffering injury while he is employed, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. In order to recover under the Federal Employers Liability Act it was incumbent upon plaintiff to prove that defendant was negligent and that such negligence was the proximate cause in whole or in part of the minors' injury. In Brady v. Southern Ry. Co., 320 U. S. 476, the court said (488):

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The Act abolished certain defenses which were recognized at common law in favor of an employer when sued for personal injuries received in the course of employment by the employee. Thus, it abolished the defense embodied in the fellow servant rule, the defense of contributory negligence and the defense of assumption of risk. The right of recovery, however, must be predicated upon negligence. The act

was amended in 1939 by adding to Section 4 the provision that in an action brought by an employee, he shall not be held to have assumed the risks of his employment where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of the carrier. In a concurring opinion in Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, Mr. Justice Frankfurter said (71):

"The effect of this provision is to make it clear that, whatever other risks an employee may assume, he does not 'assume the risk' of the negligence of the carrier or its other employees. Once the negligence of the carrier is established, it cannot be relieved of liability by pleading that the employee 'assumed the risk'."

In Union Pacific Railroad Company v. Hadley, 246 U. S. 330, Mr. Justice Holmes, speaking for the court, said (332):

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect."

In Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, the court said (354):

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. Jacob v. New York City, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The jury was instructed that if they found that plaintiff was entitled to a verdict for damages, and also found that a want of ordinary care on his part "contributed to cause his injury", then in assessing damages they should first find the total amount

was amended in 1939 [illegible] to bestow a [illegible] provision that in an action brought by an employee, he still [illegible] assumed the risks of his employment where [illegible] injury resulted in whole or in part from the negligence of [illegible] officers, agents or employees [illegible]. In concurring opinion in Tiller v. Atlantic Coast Line [illegible], Mr. Justice Frankfurter said (71):

> "The effect of [illegible] whatever [illegible] the risk of his [illegible] Once the negligence of the [illegible] relieved of liability for [illegible] risk."

In Lynch Dissenting [illegible] 250, Mr. Justice [illegible]

> "In the [illegible] took to split up the [illegible] to constituent elements [illegible] while [illegible] justified in [illegible] thought that the [illegible] court and [illegible] conclusive [illegible]."

In Lilley v. Southern Pacific Co. [illegible] court said (285):

> "The right to trial [illegible] feature of our [illegible] York City, 233 U. S. 718, [illegible] authorized [illegible] monopolies [illegible] other fields. But [illegible] reluctant to apply those [illegible] injuries. This method of distributing the [illegible] carriers and of [illegible] on them the cost of [illegible] conditions may be [illegible], [illegible] the more modern systems of workmen's compensation. But [illegible] inefficient and backward it may be, it is the [illegible] has provided. To deprive these workmen of the [illegible] trial in close or doubtful cases is to take away [illegible] of the relief which Congress has afforded them."

The jury was instructed that if they found the plaintiff was entitled to a verdict for damages, and also found that [illegible] want of ordinary care on his part "contributed to cause his injury", then in assessing damages they should first find the total amount

of the damages he sustained by reason of his injuries and then find the proportion of the whole which was caused by his own negligence, then subtract the latter amount from the former and find the difference as the amount of the verdict. The United States courts have uniformly held that the burden of proving contributory negligence is on the defendant, and have enforced that principle even in trials in states which hold that the burden is on the plaintiff. Central Vermont Railway Co. v. White, 238 U. S. 507, 512. In the instant case, in answer to a special interrogatory, the jury found that plaintiff was not guilty of contributory negligence. The record supports this finding.

We turn to a consideration of the charge that defendant carelessly and negligently operated the cars and passed the switch stand at a high and unreasonable rate of speed. It will be recalled that in answer to a special interrogatory the jury found that this charge had been proved. In so finding the jury had a right to take into consideration the surrounding circumstances. There was a conflict in the evidence as to the speed of the train. We are convinced that there was evidence before the jury to justify the finding that under the circumstances the train was being negligently operated, passing the switch stand at a high and unreasonable rate of speed.

Paragraph 5 (c) of the amended complaint charged that defendant failed to notify plaintiff that the cars were to be moved to a distant part of the yard and that plaintiff would be required to ride the cars thereto; that the signal given plaintiff indicated that the cars would be stopped a short distance beyond switch No. 4, which required plaintiff to alight near No. 4 switch; that after plaintiff had alighted, defendant carelessly gave him a peremptory order to board the train, although the grab irons were coated with ice and the cars were moving at a high and unusual speed. Plaintiff was a new man on the job, this being only the second night he worked in this yard. The conductor did not explain to him what he intended

of the damages he sustained by reason of his injuries and then find the proportion of the whole which was caused by his own negligence, then subtract the latter amount from the former and find the difference as the amount of the verdict. The United States courts have uniformly held that the burden of proving contributory negligence is on the defendant, and have enforced that principle even in states in states which hold that the burden is on the plaintiff. Central Vermont Railway Co. v. White, 238 U. S. 507, 512. In a recent case, in answer to a special interrogatory, the jury found that plaintiff was not guilty of contributory negligence. The record supports this finding.

We turn to a consideration of the charge that defendant carelessly and negligently operated the cars and failed the switch stand at a high and unreasonable rate of speed. It will be recalled that in answer to a special interrogatory the jury found that this charge had been proved. In so finding the jury had a right to take into consideration the surrounding circumstances. There was conflict in the evidence as to the speed of the train. [illegible] contended that there was evidence before the jury to justify the finding that under the circumstances the train was being negligently operated, causing the switch stand at a high and unreasonable rate of speed.

Paragraph 5 (c) of the amended complaint charged that defendant failed to notify plaintiff that the cars were to be moved to a distant part of the yard and that plaintiff would be required to ride the cars therefrom; that the signal given plaintiff indicated that the cars would be stopped a short distance beyond switch No. 4, which required plaintiff to alight near No. 4 switch; that after plaintiff had alighted, defendant carelessly gave him a peremptory order to board the train, although the grab irons were coated with ice and the cars were moving at a high and unusual speed. Plaintiff was a new man on the job, this being only the second night he worked in this yard. The conductor did not explain to him what he intended

to do, further than to tell him they were going to switch No. 1 track. We are of the opinion that there was evidence to warrant the jury in finding that the order of the conductor directing plaintiff to board the train, under all the circumstances, constituted negligence, and that such negligence was the proximate cause of the mishap. We would not be justified in disturbing the jury's determination of this issue.

Defendant contends that the court erred in admitting in evidence defendant's Rule 7-A, which reads:

> "Employees giving signals must locate themselves so as to be plainly seen, and make them in such a manner as to be readily understood. The utmost care must be used to avoid taking a wrong signal, and unless positive a signal is for them, will not accept it until advised verbally. When signals from a trainman cannot be seen, train must be stopped immediately.

Defendant asserts that there was no violation of this rule in that it had no application to the situation existing when plaintiff was injured. Plaintiff states that the rule was not offered as a substantive ground of recovery, but as tending to prove negligent operation generally; also to show that plaintiff in getting off the train was required to do so in order to comply with the rule and keep the engineer in view. We agree with plaintiff that the evidence shows that a state of confusion existed in the minds of all the crew as to what was the purpose of the northerly movement during which he was injured, where they were going, and what they were going to do when they got there. Plaintiff thought they were going to pull out just clear of No. 4 switch and then throw some cars back on tracks No. 3 or 4. Stackowski, the field man, had the same understanding, or he would not have gotten off at No. 3 switch. The conductor, however, intended going down somewhere on the Wells Street lead "all the way out". Kelly, the engineer did not know what do to. He admitted he did not know where he was going, and that the disappearance of the signalman meant to stop. The engineer went 700 or 800 feet, or approximately 20 car lengths after he lost sight of plaintiff. The act imposed liability for injuries resulting in

to do. Further than to tell him to [illegible] I think we are of the opinion that there was evidence [illegible] the jury in finding that the order of the conductor [illegible] to board the train, under all the circumstances, constituted negligence, and that such negligence [illegible] was a [illegible] of the injury. We would not be justified in disturbing the jury's determination of this issue.

[illegible] contention [illegible] is predicated on evidence determinative this A-A, which [illegible]:

"[illegible] giving [illegible] to be plaintiff [illegible] reasonably [illegible] a wrong signal, and under [illegible] cannot be [illegible] cannot be [illegible]."

Defendant [illegible] it had no [illegible] to the situation [illegible] injured. [illegible] operation generally; also to [illegible] train was required to do [illegible] keep the engineer in view. [illegible] above that a state of confusion existed [illegible] as to what was the [illegible] he was injured, where they were going, [illegible] when they got there. Plaintiff thought they were [illegible] just clear of No. 4 switch and [illegible] No. 3 or 4. Stockworth, the field man, had the [illegible] or he would not have gotten off at No. 3 switch. The conductor, however, intended going down somewhere on the Ollie Street lead "all the way out". Kelly, the engineer did not know what do to. He admitted he did not know where he was going, and that the disappearance of the signalman meant to stop. The engineer went 700 or 800 feet, or approximately 20 car lengths after he lost sight of plaintiff. The act imposed liability for injuries resulting in

whole or in part from the negligence of the defendant. We agree with plaintiff that Rule 7-A was admissible because its violation was one of the contributing causes of the accident, and also as tending to prove negligent operation generally and to show that plaintiff, in getting off the train, was in the exercise of ordinary care.

Paragraph 5 (a) charges that defendant suddenly and unnecessarily accelerated the speed of the cars as plaintiff attempted to board the train. In answer to an interrogatory the jury found that the defendant did not suddenly or unnecessarily accelerate the rate of speed of the cut of cars as plaintiff was attempting to board the train. We agree with defendant that plaintiff is bound by this finding. We are satisfied that there was evidence to warrant the jury in finding that defendant negligently failed to warn plaintiff, "an inexperienced employee," in that he was unfamiliar with the operation of defendant and the physical features of the ground and the manner in which the work was to be performed and dangers to which he was exposed. This charge presented a question of fact which the jury was competent to pass upon. Paragraph 5 (h) charges that defendant carelessly permitted a hole or depression to remain alongside the track in the vicinity of No. 4 switch, where employees were liable to stumble and fall. We agree with defendant that the testimony shows that the drain was necessarily located in the yard and that it was placed there in the exercise of defendant's judgment on an engineering problem. Paragraph 5 (e) charges that the defendant carelessly and negligently maintained the freight car in question "with defective, unsafe, unsecure and insufficient grab irons and stirrups, in that the same became and remained covered with snow and ice". The snow and ice on the grab irons came from the natural elements, over which defendant had no control. The

whole or in part from the negligence of the defendant. We agree with plaintiff that Rule 9-4 was admissible because his violation was one of the contributing causes of the accident, was also attending to prove negligent operation generally and to show that plaintiff, in getting off the train, was in the exercise of ordinary care.

Paragraph 6 (a) charges that defendant wrongfully and unnecessarily accelerated the speed of the train to plaintiff's attempt to board the train. In answer to an interrogatory the jury found that the defendant did not wrongfully or unnecessarily accelerate the rate of speed of the car at the time plaintiff was attempting to board the train. In express with determine that plaintiff is bound by this finding. We are satisfied that there is evidence to warrant the jury in finding that defendant wrongfully failed to warn plaintiff, "an inexperienced employee," in that he was unfamiliar with the operation of defendant and the physical features of the ground and the manner in which the work was to be performed and dangers to which he was exposed. This charge presents a question of fact which the jury was competent to decide. Paragraph 6 (b) charges that defendant negligently permitted a pile of debris to remain alongside the track in the vicinity of the station, where employees were liable to stumble and fall. [illegible] that the testimony shows that the track was necessarily covered in the yard and that it was placed there in the exercise of reasonable judgment on an engineering problem. Paragraph 6 (c) charges that the defendant carelessly and negligently maintained the freight car in question "with defective, unsafe, unsecure and insufficient grab irons and stirrups, in that the same became and remained covered with snow and ice". The snow and ice on the grab irons came from the natural elements, over which defendant had no control. The

presence of snow and ice on grab irons is not a violation of the Safety Appliance Act, nor is it in and of itself negligence. Paragraph 5 (f) charges that defendant negligently failed to exercise ordinary care to furnish plaintiff a reasonably safe place to work. We agree with defendant that this charge is not sustained by the evidence.

At the close of all the evidence defendant moved for a directed verdict on each of the specific charges of misconduct contained in the complaint, and requested the court to give to the jury instructions relating to each of the sub-paragraphs. These instructions advised the jury that it could not find for plaintiff on the basis of the particular sub-paragraph because there was no evidence in support of it. With reference to sub-paragraph 5 (e) the instruction requested by the defendant and marked No. 49 in the abstract was as follows:

> "Plaintiff's complaint in this case alleges that the defendant Thomson, Trustee, carelessly and negligently maintained said car with defective, unsafe, unsecure and insufficient grab irons and stirrups, in that the same became and remained covered with snow and ice. The plaintiff has failed to introduce any evidence at this trial to support that allegation of his complaint, and you will therefore, in considering your verdict, in no way base such verdict upon that charge or any such alleged negligence on the part of the defendant."

At the time the instructions relating to each of the sub-paragraphs were tendered to the court to be given on behalf of defendant, the court refused each of them, except No. 49, and the court then stated that this instruction would be given and it was marked "given". After the instructions were so marked by the court, the case was argued to the jury by the respective attorneys. All the instructions which had been marked "given" were read to the jury, except instruction No. 49. Counsel for defendant then called the court's attention to the fact that this instruction had not been read. After a colloquy as to whether the instruction should be

presence of some pad too [illegible] is not [illegible]
safely adjudge not, nor [illegible]
Paragraph 5 (f) charge [illegible]
exercise [illegible]
to work. [illegible]
by the evidence.

[illegible]
directed verdict [illegible]
such fact in the possession [illegible]
jury instructions [illegible]
instructions giving [illegible]
on the basis [illegible]
evidence in [illegible]
the instruction [illegible]
the statement [illegible]

"[illegible]
determined [illegible]
said [illegible]
[illegible]
with [illegible]
evidence at this [illegible]
and you will [illegible]
been such verdict [illegible]
on the part of the [illegible]

At the time the [illegible]
were tendered [illegible]
court refused each of them, [illegible]
stated that this instruction [illegible]
"given". After the instructions [illegible]
case was argued to the jury by the [illegible]
instructions which had been marked "given" were read to the jury,
except instruction No. 44. Counsel for defendant then called to
court's attention to the fact that this instruction had not been
read. After a colloquy as to whether the instruction should be

given, the court decided not to give it. The argument to the jury is not in the record. The court instructed the jury on the issues. The complaint of course was not delivered to the jury and their only knowledge of the issues was gained from the instructions. The charge of insufficient grab irons was omitted from the instructions and was not submitted to the jury as a substantive ground for recovery. Plaintiff did not claim, on the trial, that he could recover on that theory. The jury had the right to take into consideration the fact that the hand hold was covered with ice in determining whether defendant's conduct, viewed as a whole, was negligent. The jury was required to consider this fact along with the other attending circumstances in determining whether the order given to plaintiff to board the cars was negligent.

Defendant, by appropriate motion at the close of all the evidence and accompanied by an instruction, also asked that the charge of negligence contained in Paragraph 5 (h) be taken from the jury. This paragraph charges that defendant carelessly suffered and permitted a hole or depression to be excavated and to remain alongside the track in the vicinity of No. 4 switch. We are of the opinion that this instruction should have been given and that this charge should have been withdrawn from consideration of the jury. There are cases in Illinois holding that where an improper or unproven issue is submitted to a jury and a general verdict is returned, such verdict is erroneous because it cannot be determined whether the verdict is based on the good count or the bad one. The issues under Paragraph 5 (e) were not submitted to the jury and no verdict under that charge could have been returned. The jury answered three special interrogatories tendered by the defendant, specifically finding defendant guilty of three charges of negligence. We have held that there is evidence to sustain the finding of the jury that plaintiff was not guilty of contributory negligence, and that defendant

given, the court decided not to give it. The argument to the jury is not in the record. The court instructed the jury on the issues. The complaint of course was not delivered to the jury and their only knowledge of the issues was gained from the instructions. The charge of insufficient grab irons was omitted from the instructions and was not submitted to the jury as a sufficient ground for recovery. Plaintiff did not claim, on the trial, that he could recover on that theory. The jury has the right to take into consideration the fact that the hand hold was covered with ice in determining whether defendant's conduct, viewed as a whole, was negligent. The jury was required to consider this fact along with the other attendant circumstances in determining whether the order given to plaintiff to board the cars was negligent.

Defendant, by appropriate motion at the close of all the evidence and accompanied by an instruction, also asked that the charge of negligence contained in paragraph 3 (b) be taken from the jury. This paragraph charges that defendant carelessly suffered and permitted a hole or depression to be excavated and to remain alongside the track in the vicinity of a switch. We are of the opinion that this instruction should have been given and that this charge should have been withdrawn from consideration of the jury. There are cases in Illinois holding that where an improper or uncertain issue is submitted to a jury and a general verdict is returned, such verdict is erroneous because it cannot be determined whether the verdict is based on the good count or the bad one. The issues under Paragraph 3 (a) were not submitted to the jury and no verdict under that charge could have been returned. The jury answered three special interrogatories tendered by the defendant, specifically finding defendant guilty of three charges of negligence. We have held that there is evidence to sustain the finding of the jury that plaintiff was not guilty of contributory negligence, and that defendant

carelessly and negligently operated the cut of cars past the switch stand at a high and unreasonable rate of speed. The court, therefore, is not driven to speculation as to the basis of the jury's verdict. Par. 192, Sec. 68, of the Civil Practice Act, (Par. 192, Sec. 68, Ch. 110, Ill. Rev. Stat. 1943) reads:

> "Whenever there are several counts in a complaint based on different demands, the court shall, on the demand of either party, direct the jury to find a separate verdict upon each. But if, in any case, there are several counts, and an entire verdict is rendered thereon, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts be sufficient to sustain the verdict."

With the special interrogatories answered in favor of plaintiff, and supporting the general verdict, the court acted properly in entering judgment on the verdict.

Finally, defendant urges that the verdict is excessive. It is the province of the jury to determine the amount of the damages and reviewing courts will not substitute their judgment for that of the jury, unless it appears to be the result of passion, prejudice or misconception. We cannot say that the verdict is excessive or that it is the result of passion, prejudice or misconception. For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. CONCURS.

LEWE, J. TOOK NO PART.

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| PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN S. RUSCH, Appellee, v. SYLVIA FUSCO, HAROLD L. WINGET, BERTHA BLACK, EUNICE GOODWIN and MARY V. VARHOL, Appellants. | APPEAL FROM COUNTY COURT COOK COUNTY. |



MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

A primary and aldermanic election was held in Chicago on February 23, 1943. Sylvia Fusco and Bertha Black served as Republican judges, Harold L. Winget as Democratic judge, Eunice Goodwin as Republican clerk and Mary Varhol as Democratic clerk in the 105th precinct of the 5th ward. On July 12, 1943 John S. Rusch, Chief Clerk of the Board of Election Commissioners, filed a petition in the County Court of Cook County in which he charged that the persons who so acted as judges and clerks of election knowingly, fraudulently and unlawfully (1) made a false canvass of the votes cast; (2) permitted and acquiesced in permitting various forged and spurious applications for ballots to be presented and filed; and (3) permitted and acquiesced in permitting the stuffing of the ballot box by inserting therein ballots for each of the spurious applications. On July 12, 1943 the court, without notice to the respondents, entered an ex parte order granting leave to file the petition, finding that respondents were guilty of the charges made therein, ruling them to appear forthwith to show cause why they should not be held in contempt of court and that a writ of attachment issue for the apprehension of respondents. A trial resulted in a judgment finding respondents guilty of the misconduct described in the petition, that each was guilty of contempt and committing each to the County jail for one year. Respondents ask that the judgment be reversed.

[illegible]

[illegible] Court of [illegible],
ex rel. JOHN [illegible] BURCH,

Appellee,

v.

REVIVA BURCH, RAYMOND [illegible],
[illegible] BURCH, [illegible]
and MARY V. VIRGO,

Appellants.

[illegible]

A primary [illegible] on February 27, [illegible] Appellee [illegible] Republican Judge, Donald [illegible] Goodwin as a qualified elector [illegible] in the 126th precinct of the [illegible] Burch, Chief Clerk of the [illegible] a petition in the [illegible] that the [illegible] who do not be in [illegible] knowingly, fraudulently and [illegible] of the voter [illegible] various forms and [illegible] presented and filed; and (4) [illegible] the stuffing of the ballot box [illegible] each of the [illegible] without notice to the respondents, [illegible] leave to file the petition, finding that respondent [illegible] of the charges made therein, ruling them to [illegible] show cause why they should not be held in contempt of court and that a writ of attachment issue for the respondents of [illegible]. A trial resulted in a judgment finding respondents guilty of the misconduct described in the petition, that each was guilty of contempt and committing each to the County Jail for one year. Respondents ask that the judgment be reversed.

The primary election was held for the purpose of choosing candidates for mayor, city clerk and city treasurer, for a vacancy on the bench in the Municipal Court of Chicago, and electing an alderman for the 5th ward. The candidates for alderman were Walter Johnson, Horace G. Lindheimer, Bertram Moss and Gail Strader. In the judgment order the court found that during the election the respondents, while serving and acting as judges and clerks, "knowingly, wilfully, fraudulently and unlawfully permitted and acquiesced in permitting 134 applications for ballot to be presented and filed - the signature on each of said applications being a forgery and not signed by the person whose name appeared on said application and the signatures appearing on said applications were not examined and checked with the genuine signatures appearing on the registration cards contained in the precinct binder of the persons whose names appeared on said forged applications by the above named respondents"; further, that respondents "knowingly, fraudulently and unlawfully permitted and acquiesced in permitting 3 sets of triplicate applications for ballot to be presented and filed - one genuine application of the registered voter was presented and filed and two forged applications in the name appearing on the genuine application was presented and filed"; further, that respondents "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting 38 sets of duplicate applications for ballot to be presented and filed, to-wit: a genuine application of the registered voter was presented and filed and either before or after said presentation and filing a forged application in the name appearing on the said genuine application was presented and filed"; further, that respondents "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting 7 sets of duplicate forged applications for ballot to be filed, that is duplicate applications with the forged signature of the registered voter appearing on each, the registered voter not appearing and presenting any application for ballot"; further, that respondents

The primary election was held for the purpose of choosing candidates for mayor, city clerk and city treasurer, for a vacancy on the bench in the municipal Court of Chicago, and electing an alderman for the 6th ward. The candidates for alderman were Walter Johnson, Terence C. Lindheimer, Bertram Moss and Nil Streder. In the judgment order the court found that during the election the respondents, while acting and acting as judges and clerks, "knowingly, wilfully, fraudulently and unlawfully permitted and acquiesced in permitting 164 applications for ballot to be presented and filed - the signature on each of said applications being a forgery and not signed by the person whose name appeared on said application and the signatures purporting on said applications were not examined and checked with the genuine signatures appearing on the registration cards contained in the registration binder of the persons whose names appeared on said forged applications by the above named respondents"; further, that respondents "knowingly, fraudulently and unlawfully permitted and acquiesced in permitting 7 sets of duplicate applications for ballot to be presented and filed - one genuine application of the registered voter was presented and filed and two forged applications in the name appearing on the genuine application was presented and filed"; further, that respondents "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting 39 sets of duplicate applications for ballot to be presented and filed, to-wit: a genuine application of the registered voter was presented and filed one either before or after said presentation and filing a forged application in the name appearing on the said genuine application was presented and filed"; further, that respondents "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting 7 sets of duplicate forged applications for ballot to be filed, that is duplicate applications with the forged signature of the registered voter appearing on each, the registered voter not appearing and presenting any application for ballot"; further, that respondents

"did knowingly, fraudulently and unlawfully permit and acquiesced in permitting an application for ballot to be presented and filed in the name of a person who was not a registered voter; said person did not appear at the polling place and did not sign said application or present the same for filing"; further, that respondents, "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting an application to be presented and filed in the maiden name of a married woman who had registered in her married name, who appeared at the polling place, presenting her application for a ballot and cast her ballot in her married name but did not at the polling place prepare and present an application for ballot in her maiden name"; further, that respondents "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting applications for ballot to be presented and filed in the name of 3 persons who did not appear at the polling place, did not sign applications for ballot and were not eligible to vote in said precinct at said elections"; further, that respondents "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting ballots to be cast and counted for each and every fraudulent and forged application for ballot, to-wit: 195 Aldermanic ballots - 100 Democratic Primary ballots and 100 Republican Primary ballots"; further, that respondents "knowingly, fraudulently and unlawfully permitted and acquiesced in permitting 195 Aldermanic ballots to be cast and placed in the ballot box - said ballots not cast by persons appearing at the polling place and voting, but were cast in the names of persons forged to applications for ballots, and 100 Democratic Primary ballots and 100 Republican Primary ballots not cast by persons appearing at the polling place and voting but were cast in the names of persons whose names were forged upon applications for ballots and counted said fraudulently cast ballots in arriving at the count of the votes cast in said precinct and ward"; further, that "ballots introduced in evidence numbered 5 to 104 inclusive bore cross-marks, all made by one and

"did knowingly, fraudulently and unlawfully permit and acquiesced in permitting an application for ballot to be presented and filed in the name of a person who was not a registered voter; said person did not appear at the polling place and did not sign said application or present the same for filing"; further, that respondents, "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting an application to be presented and filed in the maiden name of a married woman who had registered in her married name, who appeared at the polling place, presenting her application for a ballot and cast her ballot in her married name but did not at the polling place prepare and present an application for ballot in her maiden name"; further, that respondents "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting public clerks for ballot to be presented and filed in the name of 3 persons who did not appear at the polling place, did not sign applications for ballot and were not eligible to vote in said precinct at said elections"; further, that respondents "did knowingly, fraudulently and unlawfully permit and acquiesced in permitting ballots to be cast and counted for each and every fraudulent and forged application for ballot, to-wit: 195 Aldermanic ballots - 100 Democratic Primary ballots and 100 Republican Primary ballots"; further, that respondents "knowingly, fraudulently and unlawfully permitted and acquiesced in permitting 195 Aldermanic ballots to be cast and placed in the ballot box - said ballots not cast by persons appearing at the polling place and voting, but were cast in the names of persons forged to applications for ballots, and 100 Democratic Primary ballots and 100 Republican Primary ballots not cast by persons appearing at the polling place and voting but were cast in the names of persons whose names were forged upon applications for ballots and counted said fraudulently cast ballots in arriving at the count of the vote cast in said precinct and ward"; further, that "ballots introduced in evidence numbered 5 to 104 inclusive bore cross-marks, all made by one and

the same person; that ballots numbered 255 to 354, inclusive, bore cross-marks all made by one and the same person; that ballots numbered 424 to 617, inclusive, bore cross-marks all made by the same person"; further, that respondents "unlawfully, wilfully and fraudulently made a false and fraudulent canvass of the vote cast in said precinct and ward in said elections and said respondents made a false and fraudulent return of the vote cast in said precinct and ward in said elections"; further, that respondents, and each of them, "by reason of the foregoing, was and is guilty of misconduct and misbehavior in office as an officer of the County Court of Cook County, in the State of Illinois," that "each of them was and is guilty of contempt of the County Court of the County of Cook and State of Illinois," and that "each of them has failed to purge himself or herself of contempt of court".

Two stipulations were received in evidence as People's Exhibits 1 and 2. Exhibit 1 is concerned with various general matters. Exhibit 2 is a stipulation concerning the testimony of certain witnesses. The stipulations and the testimony of the witnesses show the following: The polling place was located in the basement of a rooming house at 6221 Kenwood Avenue. The building is on the east side of Kenwood Avenue. The Election Commissioners leased the front portion of the basement for the balloting. The length of the polling place extended from east to west. The entrance for voters was at the back, near the northeast corner. Voters in approaching the entrance, walked in an easterly direction along a walk adjoining the north wall. The voting booths were put up along the north wall. Along the south wall there was a table about 15 feet long. The ballot box was at the west end of this table. The precinct binder was placed on this table. There were 3 chairs behind this table. There were 2 small tables to the east of the long table.

the same person; that ballots numbered 285 to 384, inclusive, bore cross-marks all made by one and the same person; that ballots numbered 424 to 517, inclusive, bore cross-marks all made by the same person"; further, that respondents "unlawfully, wilfully and fraudulently made a false and fraudulent canvass of the vote cast in said precinct and ward in said elections and said respondents made a false and fraudulent return of the vote cast in said precinct and ward in said elections"; further, that respondents, and each of them, "by reason of the foregoing, was and is guilty of misconduct and misbehavior in office as an officer of the County Court of Cook County, in the State of Illinois," that "each of them was and is guilty of contempt of the County Court of the County of Cook and State of Illinois," and that "each of them is entitled to purge himself or herself of contempt if guilty".

The stipulations were received in evidence as Exhibits 1 and 2. Exhibit 1 is concerned with v[illegible] matters. Exhibit 2 is a stipulation concerning the testimony of certain witnesses. The stipulations are as follows: The testimony of the witnesses show the following: The polling place was located in the basement of a rooming house at 6925 Kenmore Avenue. The building is on the east side of Kenmore Avenue. The Election Commissioners leased the front portion of the basement for the building. The length of the polling place extended from east to west. The entrance for voters was at the back, near the northeast corner. Voters in approaching the entrance, walked in an easterly direction along a walk adjoining the north wall. The voting booths were put up along the north wall. Along the south wall there was a table about 15 feet long. The ballot box was at the west end of this table. The precinct binder was placed on this table. There were 3 chairs behind this table. There were 2 small tables to the east of the long table.

There was a post between the large table and the first of the 2 smaller tables. This post prevented a clear view by those sitting at the large table of the applications which were placed on one of the smaller tables. There were 3 more chairs placed behind the 2 small tables, making a total of 6 available chairs. A floor plan of the polling place received in evidence shows a small settee placed at the north wall. Two of the respondents did not recall that there was such a piece of furniture in the room. There were not sufficient seats for all persons present at the polls. Whenever one of the respondents found it necessary to leave the room, his or her chair would be temporarily occupied by one of the watchers or other person present. The polling place was poorly lighted and had no toilet facilities. Respondents and other persons present were obliged to use the toilet on the first floor in the landlord's apartment. There were no radiators in the room. It had no source of heat other than some overhead pipes. There was no heat in these pipes. The room was "quite cold and damp." A watcher for the Election Commissioners described it as being "cold." There was no telephone in the room. Respondents were compelled to "walk around to keep warm."

Bertha Black served as Republican judge. She had lived in the precinct for 4 years and in Chicago since 1933. At the time of the trial she was 56 years of age. Her husband had been working for a railroad, but had become disabled. During the past 4 years she had supported herself and her husband. She worked for the W.P.A. as a clerk and at the time of the trial was employed by the War Bond Division of the Treasury Department. She had no children. She had served as a judge of election some 5 or 6 times in the same ward. Sylvia Fusco had lived in Chicago since 1909 and at the time of the trial was 42 years of age. She is married and has one daughter, but is separated from her husband. She had not previously served as either judge or clerk of election. She had a high school education.

There was a post between the large table and the first of the 2 smaller tables. This post prevented a clear view by those sitting at the large table of the ballot-stubs which were placed on one of the smaller tables. There were 3 more chairs placed behind the 2 small tables, making a total of 8 available chairs. A floor plan of the polling place received in evidence shows a small settee placed at the north wall. Two of the respondents did not see it that there was such a piece of furniture in the room. There were not sufficient seats for all persons present at the polls. Whenever one of the respondents found it necessary to leave the room, his or her chair would be temporarily occupied by one of the watchers or other person present. The polling place was poorly lighted and had no toilet facilities. Respondents and other persons present were obliged to use the toilet on the third floor in the Clerk's apartment. There were no radiators in the room. It had no source of heat other than some overhead pipes. There was no gas in these pipes. The room was "quite cold on a day." A weather for the Election Commissioners described it as being "cold." There was no telephone in the room. Respondents were compelled to "walk around to keep warm."

Bertha Black served as Republican Judge. She had lived in the precinct for 4 years and in Chicago since 1924. At the time of the trial she was 58 years of age. Her husband had been working for a railroad, but had become disabled. During the past 4 years she had supported herself and her husband. She worked for the U.S. as a clerk and at the time of the trial was employed by the War Bond Division of the Treasury Department. She had no children. She had served as a judge of election some 5 or 6 times in the same ward. Sylvia Russo had lived in Chicago since 1909 and at the time of the trial was 42 years of age. She is married and has one daughter, but is separated from her husband. She had not previously served as either judge or clerk of election. She had a high school education.

Her only business experience was in the performance of clerical work for 6 months. She did not know she was to serve on the board until the night before election. At that time the Republican precinct captain, D. S. Cartwright, told her the regularly appointed judge was ill and asked her to serve. She had first refused on the ground that she was unfamiliar with the duties of a judge, but he persuaded her to accept. She had previously refused to serve when asked to do so by Mrs. Goodwin. She was unfamiliar with the duties of a judge and with the method of conducting an election. She was entirely dependent upon other members of the board for instruction and guidance in the performance of her duties.

Eunice Goodwin served as Republican clerk. She has lived in Chicago for 21 years. She is married and has no children. She had served as an official on 3 or 4 prior occasions. She was employed by the Diamond T. Company and lived across the hall from Mrs. Fusco. Harold L. Winget served as Democratic judge. He has lived in Chicago since 1927. He had a high school and business college education. He served as a judge in 4 previous elections. He is 42 years of age, is married and has a daughter 7 years old. He owns and operates a furnished apartment building at 6214 Dorchester Avenue, where he has lived since 1938. He was not on speaking terms with Mary Campbell, the Democratic precinct captain. They had engaged in a dispute concerning a local option election. Mary Varhol served as Democratic clerk. She was employed by the Press Wireless for about 6 months prior to the trial. She had served as a clerk in several previous elections. In March, 1943, the month after the primary election, she left Chicago and went to Florida, where she remained until August. Her expenses for this trip were paid with money she inherited from an uncle. While in Florida she received a latter from Mary Campbell, Democratic precinct captain, enclosing a newspaper clipping. Mrs. Campbell advised her to remain in Florida. Miss Varhol returned to stand trial.

Her only business experience was in the performance of clerical work for 6 months. She did not know she was to serve on the board until the night before election. At that time the Democratic precinct captain, D. S. Cartwright, told her the regularly appointed judge was ill and asked her to serve. She had first refused on the ground that she was unfamiliar with the duties of a judge, but he persuaded her to accept. She had previously refused to serve when asked to do so by Mrs. Goodwin. She was unfamiliar with the duties of a judge and with the method of conducting an election. She was entirely dependent upon other members of the board for instruction and guidance in the performance of her duties.

Louise Goodwin served as a precinct clerk. She has lived in Chicago for 21 years. She is married and has no children. She had served as an official on 3 or 4 other occasions. She was employed by the Diamond T. Company and lived across the hall from Mrs. Guess. Harold L. Ickes served as Democratic judge. He has lived in Chicago since 1927. He had a high school and business college education. He served as a judge in 4 previous elections. He is 46 years old, is married and has a daughter 7 years old. He owns and operates a furnished apartment building at 5924 Kenmore Avenue, where he has lived since 1936. He was not on speaking terms with Mary Campbell, the Democratic precinct captain. They had engaged in a heated controversy concerning a local option election. Mary Varhol served as Democratic clerk. She was employed by the Press Wireless for about 6 months prior to the trial. She had served as a clerk in several previous elections. In March, 1945, the month after the primary election, she left Chicago and went to Florida, where she remained until August. Her expenses for this trip were paid with money she inherited from an uncle. While in Florida she received a letter from Mary Campbell, Democratic precinct captain, enclosing a newspaper clipping. Mrs. Campbell advised her to remain in Florida. Miss Varhol returned to attend trial.

The respondents were not particularly friendly one with the other. Mrs. Black met Mrs. Fusco for the first time on election morning. Mrs. Black had served on an election board with Mrs. Goodwin once before and with Miss Varhol and Mr. Winget on several other occasions. Mrs. Fusco knew Mrs. Goodwin as a neighbor. Mrs. Goodwin had served with Mr. Winget only once before. She did not know him very well. None of the respondents has ever held public or political office or employment of any kind. No member of the families of any of the respondents has ever held any political position. None of the respondents knew any of the candidates, nor did any of them have any interest in the outcome of the election other than such interest as any ordinary citizen might have. No person had ever asked any of them to favor or discriminate against any candidate. None of the respondents has ever been convicted of any crime, or arrested in connection with any criminal offense. Each proved good reputations for honesty and integrity in his and her community prior to the filing of the petition.

On February 22, 1943, the day before the primary election, the Election Commissioners delivered certain supplies for use at the polls. The supplies were brought to the home of Bertha Black and left with her husband. He signed a receipt for 600 Democratic ballots, 600 Republican ballots and 600 aldermanic ballots. An application binder and a sealed precinct binder were delivered to Mr. Black with the ballots. At the time of this delivery Mrs. Black was away at work. Since the Black family had no lock on their front door, Mr. Black immediately took the supplies down to Mr. Winget's apartment in the same building. Winget received the paraphernalia from Black between 12 and 1 o'clock on the afternoon of February 22, 1943. The ballots came in sealed packages of 100 each. The application binder was sealed in a steel case with wire around it. The precinct binder was similarly sealed. The parties stipulated that official paraphernalia was used exclusively in the election, and that the seals on the various

The respondents were not particularly friendly one with the other. Mrs. Black met Mrs. Jones for the first time on election morning. Mrs. Flock had served on an election board with one, Goodwin once before and with Mrs. Tewksbury and Mr. Hunt on several other occasions. Mrs. Jones knew Mrs. Goodwin as a neighbor. Mrs. Goodwin had served with Mr. Hunt only once before. She did not know him very well. None of the respondents had ever held public or full time office or employment of any kind. Neither one of the families of any of the respondents has ever [illegible] political [illegible]. None of the respondents knew any of the [illegible] candidates. [illegible] any interest in the outcome of the election [illegible] such interest as any ordinary citizen might have. [illegible] any [illegible] to favor or discriminate against any candidate. None of the respondents has ever been convicted of any crime, nor have they been connected in any way with any criminal offense. Each proved a good record for honesty and integrity in his and his community. [illegible] of the [illegible].

On February 22, 1962, [illegible] the primary election, the Election Commissioners delivered [illegible] for use at the polls. The supplies were brought to the home of Martin Black and left with her husband. As there is no [illegible] in Jerusalem, 600 republican ballots and 600 [illegible] ballots. In sealing them under and a sealed envelope bundle was delivered to Mr. Black with the ballots. At the time of the delivery Mr. Black was [illegible] at work. Since he lives nearby he had to leave his [illegible], Mr. [illegible] immediately took the supplies down to Mr. Hunter's apartment in the same building. Hunter received the paraphernalia from Black between 12 and 1 o'clock on the afternoon of February 22, 1962. The ballots came in sealed packages of 100 each. The application binder was sealed in a steel case with wire around it. The precinct binder was similarly sealed. The parties stipulated that official paraphernalia was used exclusively in the election, and that the seals on the various

packages containing supplies were not broken until 6 a.m. on election morning. Mrs. Black and Mr. Winget visited the polling place at 8 o'clock the evening before the election. Mrs. Goodwin was there with them for a few minutes. They saw that booths and curtains were ready and that items such as candles and pencils were available. When they left, the application binder in its original seal was locked in the ballot box. Winget locked the door to the polls, and took the key to the ballot box with him. He placed the precinct binder and sealed packages of ballots and other supplies alongside his bed and locked his room when he retired.

Mrs. Black and Mr. Winget went to the polls together on election morning. They arrived at about 5:45 a.m. Winget carried the precinct binder and Mrs. Black carried the ballots and other supplies. All of the sealed supplies were intact. A pliers was used to break open those items which were sealed with wire. Winget unlocked the ballot box and summoned the police officer to verify the fact that it was empty. He then locked the empty box and retained exclusive possession of the key for the balance of the day. Mrs. Black opened one package of each type of ballot. She placed the remaining sealed packages on the floor under the overhead pipes behind where the respondents sat to conduct the election. That was the only place available for the ballots. During the day as Mrs. Black opened these packages of ballots, she counted the contents and found 100 ballots in each package.

Mrs. Fusco and Mrs. Goodwin went to the polls together. They were a few minutes late and arrived at 6:05 a.m. By that time a few voters had cast their ballots. Miss Varhol came to the polls at about 6 a.m., shortly after the arrival of the other respondents. Mrs. Fusco was sworn in as a substitute judge by Mrs. Black. An indication that Mrs. Fusco was ignorant of her duties as a judge is shown by the fact that she did not sign her oath of office and that

packages containing ballots were not broken until [illegible] on election morning. Mrs. Olson and Mr. Hager started the polling place at 8 o'clock the evening before the election. Mrs. Goodwin was there with them for a few minutes. They set up tables and everything were ready and that there such as ballots and pencils were available. When they left, the application blanks in the envelopes were left [illegible] locked in the ballot box. Hager locked the door to the [illegible] and took the key to the ballot box with him. He placed the [illegible] binder and sealed packages of ballots and other supplies [illegible] his bed and locked his [illegible] room [illegible] retiring.

Mrs. Olson and Mr. [illegible] of [illegible] the polls [illegible] on election morning. They [illegible] about [illegible] Hager [illegible] the envelope binder and [illegible] [illegible] supplies. All of the [illegible] ballots [illegible] ballot. [illegible] was to break open those [illegible] [illegible] with [illegible]. Hager [illegible] the ballot box and [illegible] the police officer to [illegible] the [illegible] it was empty. He then locked the empty box and retained exclusive possession of the key for the balance of the day. Mrs. Olson opened one package of each type of ballot. She placed the remaining sealed packages on the floor under the overhead [illegible] where the respondents set to conduct the election. [illegible] the only place available for the ballots. Taking the key [illegible] Mrs. Olson opened each package of ballots, she counted the contents and found 100 ballots in each package.

Mrs. Tuseo and Mrs. Goodwin went to the polls together. They were a few minutes late and arrived at 6:05 a.m. By that time a few voters had cast their ballots. Miss Tarbell came to the polls at about 8 a.m., shortly after the arrival of the other respondents.

Mrs. Tuseo was sworn in as a substitute judge by Mrs. Olson. An indication that Mrs. Tuseo was ignorant of her duties as a judge is shown by the fact that she did not sign her oath of office and that

on a voter's affidavit, she took her own acknowledgment. Sarah Rowald, regularly commissioned judge, did not appear at the polls to act as judge. She did not notify any of the other respondents or the Election Commissioners that she would not serve. She testified that she had a conversation with the Republican precinct captain before the primary and that he told her that some other lady whose name he did not mention, had a commission to act as judge, so that she (Rowald) would not serve.

After voters entered the polling place, they walked southwest toward the tables at which respondents sat. Mrs. Goodwin took applications from the pad and handed them to the voters in numerical order. She sat at the small table immediately to the east of the large table. She testified that in no instance did she give any voter more than one application. In all cases she took this application from the top of the pad, so that applications were always given out strictly in numerical order. The voter signed his name and address on the application and returned it to Mrs. Goodwin. She then passed the signed application on to Mrs. Fusco and Mr. Winget, who sat to the left at the large table behind the precinct binder. Winget compared the signatures of voters whose names began with "A" to "L" and Mrs. Fusco compared those beginning with "M" to "Z". Mrs. Fusco, being unacquainted with the proceudre, was instructed by the others. If the signature checked, the application was initialed and passed on to Miss Varhol, who sat to the left. The voter then obtained his ballot from Mrs. Black, who was at the ballot box. Mr. Winget and Mrs. Fusco did not approve any application for ballot without checking the signature against the precinct binder. In all instances the signatures were found genuine on comparison. Mrs. Fusco testified that she never found any signature on an application that did not correspond with the signature in the binder. Winget testified that he never approved an appliction which had already been initialed and that no application was presented to him that was not accompanied by a voter who immediately obtained a ballot.

on a voter's affidavit, she took her own acknowledgment. Sarah Howard, regularly commissioned judge, did not appear at the polls to act as judge. She did not notify any of the other recorders or the Election Commissioners that she would not serve. She testified that she had a conversation with the Republican precinct captain before the primary and that he told her that some other lady whose name he did not mention, had a commission to act as judge, so that she (Howard) would not serve.

After voters entered the polling place, they walked northwest toward the tables at which recorders sat. Mrs. Hudson took applications from the voters in numerical order. She sat at the small table immediately to the east of the large table. She testified that in no instance did she give any voter more than one application. In all cases she took only one application from the top of the pad, so that the lines were filled in strictly in numerical order. The voter signed his name and address on the application and returned it to Mrs. Hudson. He then marked the signed application on to Mr. Hugo and Mr. Hugel, who sat to the left at the large table behind the precinct binder. Hugel compared the signatures of voters whose names begin with "A" to "L" and Mr. Hugo compared those beginning with "M" to "Z". Mrs. Hugo, being unacquainted with the procedure, was instructed by the others. If the signature checked, the application was initialed and passed on to Miss Varhol, who sat to the left. The voter then obtained his ballot from Mrs. Black, who was at the ballot box. Mr. Hugel and Mrs. Hugo did not approve any application for ballot without checking the signature against the precinct binder. In all instances the signatures were found genuine on comparison. Mrs. Hugo testified that she never found any signature on an application that did not correspond with the signature in the binder. Hugel testified that he never approved an application which had already been initialed and that no application was presented to him that was not accompanied by a voter who immediately obtained a ballot.

After applications had been checked by the judges and initialed, they were given to Miss Varhol. She printed the voter's name on the applications and then spindled them in numerical order. Miss Varhol did that all day and that was all she did. When Mrs. Black was advised that a voter's application had been approved by the judges, she initialed a party ballot and an aldermanic ballot and gave them to the voter. She did not give anyone a ballot who did not sign an application. No person received more than one of each kind of ballot. She initialed only one ballot at a time. The voter then stepped across the room to the booths, which were located in the northwest corner. He or she marked and folded his or her ballots and then returned them to Mrs. Black, who put them into the ballot box.

It was necessary to vary this routine from time to time during the day because there was no washroom in the polling place, and also because those present were obliged to leave for their meals and to obtain temporary relief from the cold and damp atmosphere of the polls. Mrs. Black left the polls several times during the day. She remained away only long enough to get warm. On one occasion she was sick to her stomach and "stayed in the bathroom for quite a while." She had been ill for a long time and was ill that day. Mrs. Black did not go out to eat. When she was out, Mrs. Fusco took her place at the ballot box. Mrs. Fusco did not find it necessary to open a new package of ballots. In all cases she continued to use packages which Mrs. Black had previously opened and counted. Mrs. Fusco left the polling place several times to go to the washroom. She would be gone from 5 to 10 minutes. She also left the polls to go home for lunch. This took her about 20 minutes. She asked permission from the other members of the board before leaving. Mrs. Goodwin was obliged to leave the polling place about 6 or 7 times to go to the washroom. On each occasion she remained away for about 10 minutes. She also left

After ballots have been checked by the judges and initialed, they were given to Miss Yarbol. She printed the voter's name on the applications and then matched them in numerical order. Miss Yarbol did that all day and that was all she did. When Mrs. Black was asked that a voter's application had been checked by the judges, she initialed a party ballot and an alternate ballot and gave them to the voter. The ballots were always given to the voter not sign an application. No voter received more than one of each kind of ballot. She initialed only one ballot at a time. The voter then stepped across the room to the booths, which were located in the northwest corner. He or she marked and folded the ballots and then returned the [illegible] Mrs. Black, who [illegible] the ballot box.

It was necessary to [illegible] during the day because there was no washroom in the polling place, and also because these [illegible] were obliged to leave the polls and to obtain temporary relief from the cold and [illegible] of the polls. Mrs. Black left the polls several times during the day. She remained away only long enough to go [illegible]. On one occasion she was sick to her stomach and remained in the washroom for quite a while. She had been ill for a long time and was ill that day. Mrs. Black did not go out to eat. When she was out, Mrs. Jones took her place at the ballot box. Mrs. Jones did not find it necessary to open a new package of ballots. In all cases she continued to use a package which Mrs. Black had previously opened and counted. Mrs. Jones left the polling place several times to go to the washroom. She would be gone from 5 to 10 minutes. She also left the polls to go home for lunch. This took her about 20 minutes. She asked permission from the other members of the board before leaving. Mrs. Goodwin was obliged to leave the polling place about 6 or 7 times to go to the washroom. On each occasion she remained away for about 10 minutes. She also left

the polling place about 1:30 for about 20 minutes to go home for lunch. Miss Varhol substituted for her on these occasions. Mrs. Goodwin was troubled with a cold during the day. About 8 a.m. Miss Varhol found the cold unbearable. She requested and received permission to go home for warmer clothing. She was gone about 15 minutes. She made a short trip to the washroom about 10 a.m. At noon she went to a restaurant for lunch and was gone an hour. She went to the washroom twice during the afternoon. When Miss Varhol returned from home shortly after 8 a.m, she found Mrs. Campbell sitting in her chair behind the application binder. Mrs. Campbell was "looking through the binder." She said she was checking the names of voters against her poll list to see who had voted. Mrs. Campbell vacated the chair when Miss Varhol entered and let her sit down. When Miss Varhol saw Mrs. Campbell, the latter was not performing any of the duties of a clerk, and she did not see Mrs. Campbell putting any applications on the spindle. If she had, she "would have protested." When Miss Varhol returned from lunch she again found Mrs. Campbell sitting in her seat. There were about 30 or 40 applications which had not been filed, on the table by the binder. Miss Varhol inquired of Mrs. Campbell, "Did all these people vote?" Mrs. Campbell replied in the affirmative and stated there had been quite a rush. Miss Varhol did not know if the other respondents heard this conversation. She then proceeded to file the applications in the binder in numerical order. Mrs. Campbell and her daughter, Ellendale, had poll lists upon which they checked the names of those who had voted. They would occasionally check their poll lists against the application. Mrs. Campbell also sent out "chasers" to urge people who had not voted to come in and cast their ballots. Mrs. Goodwin testified that she knew Mrs. Campbell "just casually," and that she never saw her take hold of or handle any official election paraphernalia.

the polling place about 1:30 for about 20 minutes to go home for lunch. Miss Vernol substituted for her on these occasions. Mrs. Goodwin was troubled with a cold during the day. About 2 p.m. Miss Vernol found the cold unbearable. She requested and received permission to go home for warmer clothing. She was gone about 15 minutes. She made a short trip to the washroom at 2 p.m. At noon she went to a restaurant for lunch and was gone an hour. She went to the washroom twice during the afternoon. When Miss Vernol returned from home shortly after 2 p.m. she found Mrs. Campbell sitting in her chair behind the polling place table. Mrs. Campbell was "looking through the binder." The roll of the registration of names of voters against her would "let to be [illegible]." Mrs. Campbell vacated the chair when Miss Vernol returned and "let her sit down." When Miss Vernol was gone, "[illegible]," the latter did not [illegible] any of the duties of the clerk, and she did not [illegible]. Campbell putting any qualifications on the ballots. If she did, she "will have protested." When Miss Vernol returned from lunch, he again found Mrs. Campbell sitting in her place. There were about 60 or 80 applications which had not been filed, on the table by the binder. Miss Vernol inquired of Mrs. Campbell, "Did all these people vote?" Mrs. Campbell replied in the affirmative and stated there had been quite a rush. Miss Vernol did not know if the other [illegible] heard this conversation. She then proceeded to file the applications in the binder in numerical order. Mrs. Campbell and her daughter, Miranda, had poll lists upon which they checked the names of those who had voted. They would occasionally check their poll lists against the applications. Mrs. Campbell also sent out "runners" to urge people who had not voted to come in and cast their ballots. Mrs. Goodwin testified that she knew Mrs. Campbell "just casually," and that she never saw her take hold of or handle any official election paraphernalia.

Mrs. Black testified that she did not see either of the Campbells touch, handle or tamper with any of the applications or ballots. Winget testified that he did not see Mrs. Campbell or any other person other than the judges and clerks handle applications for ballots. He and Mrs. Campbell were not on speaking terms. The record does not show the whereabouts of Ellendale Campbell. Mary Campbell was in California at the time of the trial. Neither testified in the case.

About two weeks before the election, Winget caught a severe cold while washing windows and it settled in his bronchial tubes. He was so hoarse he could hardly speak. He took two bottles of cough medicine to the polls. The Republican precinct captain brought him some tablets. He took this medicine frequently during the day. Apparently, his cold affected his kidneys, and he was obliged to go to the toilet about 10 times that day. He remained out from 5 to 10 minutes each time. At about 11:30 a.m. he was so chilled and uncomfortable he thought himself in danger of contracting pneumonia. At Mrs. Black's suggestion he went to his home across the alley to get a sweater. He returned in about 20 minutes with a pot of hot coffee. At about 3 p.m. Winget asked to be excused on account of his health, but at the request of Mrs. Black he held out until 5 p.m. With the consent of the respondents he went home after the polls closed at 5 p.m., before the counting began. He then gave the key to the ballot box to Mrs. Black. He was not present during the canvass. He went home and went to bed. Before he left he signed the tally sheets and other paraphernalia in blank. This was done in the presence of the other members of the board after consulting with them. The principle reason for this procedure was to permit him to collect his salary. He had confidence in the integrity of the respondents. He testified that Mrs. Goodwin told him some months after their arrest that Ellendale Campbell took some applications out. Mrs. Goodwin admitted having talked to Winget, but denied she

Mrs. Hiaok testified that she did not see either [illegible] touch, handle or tamper with any of the [illegible] or ballots. Winget testified that he did not see Mr. Campbell or any other person other than the judges and clerks handle any [illegible] or ballots. Mr. and Mrs. Campbell were not on [illegible]. The record does not show the whereabouts of [illegible] Campbell was in [illegible] at the time [illegible] testified in the case.

About two weeks [illegible] severe cold while working [illegible] tubes. He was so hoarse [illegible] of cough medicine to the voters. [illegible] brought him some tablets. He took [illegible] the day. Apparently, [illegible] obliged to go to the ballot about 10 times [illegible] a.m. He was so chilled and uncomfortable [illegible] of contracting pneumonia. [illegible] his home [illegible] minutes with a pot of hot coffee. [illegible] be excused on account of his health, but [illegible] he held out until 3 p.m. [illegible] home after the polls closed at 6 [illegible] then gave the key to the ballot box to [illegible] during the canvass. He went home and went to bed. [illegible] he signed the tally sheets and other paraphernalia in [illegible] was done in the presence of the other members of the board [illegible] consulting with them. The principal reason for this procedure was to permit him to collect his salary. He had confidence in the integrity of the respondents. He testified that Mrs. Goodwin told him some months after their arrest that Wilmuth Campbell took some modifications out. Mrs. Goodwin admitted having talked to Winget, but denied she

told him that Ellendale had taken some of the applications. During the entire day there was never any occasion on which more than one member of the board was absent from the polling place. Whenever any of the respondents was obliged to leave for a few minutes, he or she did so with full confidence that the remaining officials would properly conduct the election in his or her absence and in the presence of the watchers and the police officer.

When the polls closed, the door to the polling place was locked and respondents, watchers and the police officer remained inside. An official proclamation furnished by the Election Commissioners was read, warning all persons present that no one but the judges was to count ballots and no one but the clerks was to tally votes. The police officer cautioned all persons other than judges and clerks not to touch the ballots, and that such persons were to stay 15 feet away from the table. Mrs. Fusco was under the impression that her duties had been completed at 5 p.m., and was surprised to learn that there was additional work to be done. The box was opened and the ballots placed on the table. They were sorted and unfolded. Only the judges handled the ballots. The canvass took place in full view of all persons present in the polling place. Winget left shortly after 5 p.m. and before the count commenced. Mrs. Black started to call the votes from the ballots. Mrs. Fusco sat beside her and watched as she called. Miss Varhol and Mrs. Goodwin each recorded the results on the tally sheets. They were directly across the table from each other. The clerks did not use a dummy tally sheet. They recorded the results as called, directly on the official tally sheets. In all instances the ballots were correctly called. Mrs. Black did not fail to call a vote for any candidate where there was a cross before his name. She did not call a vote for any candidate where there was no cross before his name. In all instances the clerks tallied the ballots correctly as called. After one half hour or 45 minutes of tallying, Mrs. Fusco relieved Mrs. Goodwin at the tally

told him that Allendale had taken some of the [illegible] tions. During the entire day there was never any occasion on which more than one member of the board was absent from the polling place. Whenever any of the respondents was obliged to leave for a few minutes, he or she did so with full confidence that the remaining officials would properly conduct the election in his or her absence and in the presence of the watchers and the police officer.

When the polls closed, he door to the polling place was locked and respondents, watchers and the police officer remained inside. An official proclamation furnished by the [illegible] was read, stating all persons present that no one but the judges was to count ballots and no one but the clerks was to [illegible] the police officer continued [illegible] persons other than judges and clerks to touch the ballots, and that such persons [illegible] away from the table. Then, [illegible] under the impression that their duties had been completed at 6 p.m., [illegible] to learn that there was additional work to be done. The [illegible] ballots placed on the table. They were counted and initialed, until the judges handled the ballots. The canvass took place in full view of all persons present in the polling place. Ended fairly shortly after 5 p.m. and before the count commenced. Mrs. Jones started to call the votes from the ballots. Mrs. Fusco and Mrs. Goodwin [illegible] watched as she called. Miss Verbol and Mrs. Goodwin were recording the results on the tally sheets. They were directly across the table from each other. The clerks did not use a [illegible] tally sheet. They recorded the results as called, directly on the official tally sheets. In all instances the ballots were correctly called. Mrs. Jones did not fail to call a vote for any candidate where there was a cross before his name. She did not call a vote for any candidate where there was no cross before his name. In all instances the clerks tallied the ballots correctly as called. After one half hour or 45 minutes of tallying, Mrs. Fusco relieved Mrs. Goodwin at the tally

sheets and completed the canvass. After completion of the canvass, the ballots were properly sealed in the boxes and the four election officials present signed all of the necessary official documents. These four respondents took a taxicab to the Hyde Park High School, where they delivered the ballots and other paraphernalia to representatives of the Election Commissioners.

The applications for ballots were not altered or tampered with since they were delivered to the Election Commissioners by respondents. People's Exhibit No. 2 shows the following as to forged or spurious applications: (1) There were a total of 99 forged or spurious applictions filed; (2) There were 16 sets of duplicate applications, with both in each set being spurious; (3) There were 38 sets of duplicate applications, with one in each set being genuine and the other spurious; and (4) There were 3 sets of applications in triplicate, with one in each set being genuine and all of the others spurious. By the stipulation introduced as People's Exhibit No. 2, it was admitted that if the persons whose names are hereinafter mentioned were called as witnesses, they would testify to the following: (1) Margaret McDonald who had changed her name prior to the February 23, 1943 election from Margaret Nilles, did not vote at the primary and aldermanic election either in the name of Margaret Nilles or Margaret McDonald; did not sign the name of Margaret Nilles on application No. 13, and was not in Chicago on February 23, 1943, but in Florida. (2) Applications were signed in the names of 10 persons in the Armed Forces; the signatures were not those of such persons as shown on spurious applications 39, 40, 53, 56, 145, 150, 155, 157, 253, 298, nor did the 10 persons vote at the primary and aldermanic election on February 23, 1943. (3) Two applications were signed in the name of Frank E. Hill, the name of Houston Taylor, the name of Chester A. Naffzinger and in the name of John A. Holmes;

sheets and completed the canvass. After completion of the canvass, the ballots were properly sealed in the boxes and the four election officials present signed all of the necessary official documents. These four respondents took a taxicab to the Hyde Park High School, where they delivered the ballots and other paraphernalia to representatives of the Election Commissioners.

The applications for ballots were not altered or tampered with since they were delivered to the election commissioners by respondents. People's Exhibit No. 2 shows the following as forged or spurious applications: (1) There were a total of 99 forged or spurious applications filed; (2) There were 14 sets of duplicate applications, with both in each set being spurious; (3) There were 38 sets of duplicate applications, with one in each set being genuine and the other spurious; and (4) There were 3 sets of applications in triplicate, with one in each set being genuine and all of the others spurious. By the stipulation introduced as People's Exhibit No. 2, it was admitted that if the persons whose names are hereinafter mentioned were called as witnesses, they would testify to the following: (1) Margaret McDonald who had changed her name prior to the February 23, 1942 election from Margaret Miller, did not vote at the primary and aldermanic election either in the name of Margaret Miller or Margaret McDonald; did not sign the name of Margaret Miller on application No. 13, and was not in Chicago on February 23, 1942, but in Florida. (2) Applications were signed in the names of 13 persons in the Armed Forces; the signatures were not those of such persons as shown on spurious applications 39, 40, 55, 56, 142, 156, 158, 157, 282, 298, nor did the 13 persons vote at the primary and aldermanic election on February 23, 1942. (3) Two applications were signed in the name of Frank E. Hill, the name of Houston Taylor, the name of Chester A. Neffinger and in the name of John A. Holmes;

that these persons were in the Armed Forces; that none of them voted, nor did any of them sign applications. (4) Seven persons, who did not vote or sign applications for ballots, applications 202, 251, 113, 111, 217, 237 and 156, were returned signed in their names. (5) Ragner M. Eckstrom signed application 335. Applications 203 and 51 each contained his name, which he did not sign and he voted but once. Margo D. Esmond signed application 183. Spurious applications 227 and 276 purport to be signed by her. She signed only one application and voted but once. Margaret Duffin signed one application, 424, and she voted but once. Spurious applications 154 and 241 purport to be signed by her. (6) Five persons who no longer lived in the precinct did not vote, but applications not signed by them but purporting to be signed by them, were returned. (7) Two persons who moved out of the ward did not vote, but 2 applications for each, 206, 214 and 57, 261, were signed in their names, but they did not sign such applications. May Davis voted but once, but did not write the name of May Davis on application 160. (8) If investigators for the Board of Election Commissioners were to testify, they would testify that 19 persons no longer resided in the precinct and that the purported signature on each application for ballot of the 19 persons was not the signature or same writing as on the registration card of the 19 persons. James B. Walsh and Theresa J. Hickey moved out of the precinct before the primary and aldermanic elections and the handwriting of Walsh on applications 283 and 339 was not the handwriting of Walsh; nor was the handwriting on applications 338 and 341 the handwriting of Hickey. (9) Josephine Carrol did not vote, but 2 applications were returned that were not in her handwriting or signed by her. (10) Henry Krefft, a registered voter in the precinct, did not vote. Two applications, 218 and 252, were signed in his name although he did not sign them. The same situation prevailed with Albert E. Naffzinger,

that these persons were in the armed forces; that none of them voted, nor did any of them sign applications. (4) Seven persons, who did not vote or sign applications for ballots, applications [illegible], [illegible], 111, 217, 227 and 152, were returned signed in their handwriting. (5) Wagner v. Robertson filed application 125. Applications 232 and 81 each contained his name, which he did not sign and he voted but once. Margo L. Simond signed application 142. Duplicate applications 147 and 276 purport to be signed by her. She signed only one application and voted but once. Margaret [illegible] signed [illegible], 181, and she voted but once. Duplicate applications [illegible] and [illegible] to be signed by her. (6) [illegible] signature in [illegible] precinct did not vote, but [illegible] signature [illegible] purporting to be signed by them, [illegible]. (7) [illegible] moved out of the ward [illegible], but [illegible] 214 and 27, 271, were signed in their name, but [illegible] such applications. May [illegible] voted but once, [illegible] name of May Davis on application 176. (8) [illegible] Board of Election Commissioners [illegible], they could verify that 12 persons no longer resided in the precinct and [illegible] signature on each application for ballot of the 12 persons are not the signature or name writing as on the registration card of the 12 persons. James A. Walsh and [illegible]. Hickey never put out of the precinct before the primary and alternate elections and the handwriting of Walsh on applications 188 and 329 was not the handwriting of Walsh; nor was the handwriting on applications 328 and 141 the handwriting of Hickey. (9) Josephine Farrell did not vote, but 2 applications were returned that were not in her handwriting or signed by her. (10) Henry Kraft, a registered voter in the precinct, did not vote. The applications, 218 and 282, were signed in his name although he did not sign them. The same situation prevailed with Albert E. Nettinger,

applications 222 and 271; with William R. Wood, applications 212 and 258; with Theresa Naffzinger, applications 224 and 273; with Basil A. Fisher, applications 282 and 340; with Cora J. Clark, applications 284 and 288; and with Dorothy Ann Brown, applications 280 and 299. (11) Fifty seven persons who were registered and did not vote or sign applications for ballots were voted and applications for ballots for each were filed and returned by respondents. (12) Thirty seven persons voted, but applications for ballots returned by respondents contained an additional application for each of these 37 persons, not in the handwriting of these persons. (13) LaVerne Pettiford, formerly Rogoff, testified that she did not vote and that application 152 signed in the name of LaVerne Rogoff was not her signature or writing. (14) Sarah Rowald testified that she did not vote and that application 117 was not in her handwriting. Applications 117 and 152, each bearing the name of Sarah Rowald, were in the same handwriting.

Rudolph B. Salmon testified as a handwriting expert on behalf of petitioner. His report concerning applications for ballots was received in evidence as People's Exhibit N. 19 and his report concerning ballots was received in evidence as People's Exhibit No. 20. It was stipulated that these reports be received in evidence as the direct testimony of the witness, subject to cross-examination. The report concerning applications is not far different from the stipulation as to spurious applications. It also shows sets of applications in duplicate and triplicate. The report as to ballots is that there were 100 Democratic ballots and 194 aldermanic ballots bearing cross-marks, all made by one person, and 100 Republican ballots all bearing cross-marks made by one person. Salmon was of the opinion that all of the spurious applications were written by one person. He could not tell who wrote the applications, or if the writer was a man or woman.

applications 222 and 271; with William R. Wood, applications 212 and 236; with Thereza Matthinger, applications 234 and 272; with Basil A. Timber, applications 232 and 240; with Cora J. Clark, applications 284 and 282; and with Dorothy Ann Brown, applications 280 and 292. (11) Fifty seven persons who were registered and did not vote or sign applications for ballots were voted and applications for ballots for each were filed and returned by respondents. (12) Thirty seven persons voted, but applications for ballots returned by respondents contained an additional application for each of these 37 persons, not in the handwriting of these persons. (13) Laverne Pettiford, formerly Boggs, testified that she did not vote and that application 152 signed in the name of Laverne Boggs was not her signature or writing. (14) Sarah Howard testified that she did not vote and that application 117 was not in her handwriting. Applications 117 and 152, each bearing the name of Sarah Howard, were in the same handwriting.

Rudolph F. Salmon testified as a handwriting expert on behalf of petitioner. His report concerning applications for ballots was received in evidence as People's Exhibit 4. 19 and his report concerning ballots was received in evidence as People's Exhibit No. 20. It was stipulated that these reports be received in evidence as the direct testimony of the witness, subject to cross-examination. The report concerning applications is not less different from the stipulation as to spurious applications. It also shows note of applications in duplicate and triplicate. The report as to ballots is that there were 100 Democratic ballots and 194 aldermanic ballots bearing cross-marks, all made by one person, and 100 Republican ballots all bearing cross-marks made by one person. Salmon was of the opinion that all of the spurious applications were written by one person. He could not tell who wrote the applications, or if the writer was a man or woman.

Samples of the handwriting of all respondents were submitted to him for examination. In his opinion none of the respondents had written any of the spurious applications. Salmon was also of the opinion that one person had placed all of the cross-marks on 100 Democratic ballots, numbered 5 to 104, and on 194 aldermanic ballots, numbered 424 to 617, and that one other person had placed all of the cross-marks on 100 Republican ballots, numbered 255 to 354. The expert had no opinion as to the identity of the two persons whom he contended had marked these ballots. Respondents offered in open court to submit samples of cross-marks made by them to the expert for comparison. Petitioner objected and the test was not made. All of the questioned ballots bore pencil initials, "B.B" or "S. F." Salmon was of the opinion that these initials were not in the handwriting of any of the respondents. He bolstered his opinion with enlarged photographs of portions of the ballots and of the applications in question, which photographs were received in evidence as People's Exhibits Nos. 1 to 9, inclusive. On the trial the attorney for Winget took the position that it was impossible for any person to classify cross-marks as to the identity of the marker, merely by the process of examination of the ballots, and in support of this theory respondents introduced the testimony of George W. Schwartz as an expert witness. He gave his qualifications as a handwriting expert. He had examined the questioned ballots on two occasions and in his opinion it was not possible as a handwriting expert to tell whether or not the same person had marked the ballots.

Arthur A. Goodman was the police officer assigned to the polling place. He was called as a witness by petitioner. This was his first assignment to this precinct. He arrived at the polls about 6:10 a.m. He left for lunch about 11 a.m. and did not return until about 3:30 p.m. In the meantime, he was also on duty at another polling place in the vicinity. After returning, he did not leave the polls until the canvass had been completed and the paraphernalia all sealed in the packages. He stated that the polling

Samples of the handwriting of all respondents were submitted to him for examination. In his opinion none of the respondents had written any of the spurious applications. Salmon was also of the opinion that one person had placed all of the cross-marks on 100 Democratic ballots, numbered 3 to 104, and on 184 Liberal ballots, numbered 484 to 617, and that one other person had placed all of the cross-marks on 100 Republican ballots, numbered 255 to 354. The expert had no opinion as to the identity of the two persons when he contended had marked these ballots. Respondents offered an open court to submit samples of cross-marks made by them to the expert for comparison. Petitioner objected and the task was not done. All of the questioned ballots bore pencil initials, "E.J." or "E. F." Salmon was of the opinion that these initials were not in the handwriting of any of the respondents. He delivered his opinion with enlarged photographs of portions of the ballots and of the applications in question, which photographs were received in evidence as Possible Exhibits Nos. 1 to 9, inclusive. On the trial the attorney for petitioner took the position that it was impossible for any person to identify cross-marks as to the identity of the marker, merely by the process of examination of the ballots, and in support of this theory respondents introduced the testimony of George H. Somerts as an expert witness. He gave his qualifications as a handwriting expert. He had examined the questioned ballots on two occasions and in his opinion it was not possible as a handwriting expert to tell whether or not the same person had marked the ballots.

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place was "quite cold and damp." He testified that Winget was sick and left the polls shortly after 5 o'clock and did not return. Officer Goodman stated that each person that he saw walk into the polling place signed an application and turned it over to one of the officials; that whenever an application was presented, it was checked against the precinct binder; that during the time he was present he did not see any person obtain a ballot without signing an application; and that he did not see any person hand in more than one application. In the afternoon at about 4 p.m. he had a brief conversation with Victor W. Lehman, a watcher for Bertram Moss, a candidate for alderman. This conversation was outside of the presence of respondents. As a result of the conversation, officer Goodman looked at the ballot box and saw "some small white ballots which seemed to be placed up against the window." He offered to call the Election Commissioners, but neither Lehman nor he thought the matter worthy of any further attention or comment. During the canvass no one but the judges of election touched the ballots. All those present had full opportunity of checking on the accuracy of the canvass and the manner in which it was done. No complaint of any kind was made by any person as to the procedure used, or the accuracy of the count. Mr. Lehman was a lawyer. He arrived at the polls at about 7 a.m. and left for lunch about 11;30 a.m. and returned about noon. He testified that when he left the officials had reached applications No. 150 or 160; that when he returned about 100 additional applications had been used; that he made a remark about this to Mrs. Goodwin, who replied that the polls had been quite busy during his absence; and that this conversation was only in the presence of Mrs. Goodwin. Lehman testified further that he observed no act of the judges or clerks that might be classified as misconduct. He occasionally found it necessary to leave the polls to visit the toilet. He did not see any person receive more than the proper number

place was "quite cold and damp." He testified that Winget was sick and left the polls shortly after 5 o'clock and did not return. Officer Goodman stated that each person that he saw walk into the polling place signed an application and turned it over to one of the officials; that whenever an application was concerted, it was checked against the precinct binder; that during the time he was there he did not see any person obtain a ballot without signing an application; and that he did not see any person stand in more than one application. In the afternoon at about 4 o.m. he met a brief conversation with Victor L. Lehman, a veteran of the veteran board, a candidate for alderman. This conversation was outside of the presence of prosecutrix. As a result of the conversation, officer Goodman walked to the ballot box and saw "some small white ballots which seemed to be piled up against the window." He offered to call the election commissioner, but neither Lehman nor he thought the matter worthy of any further attention or comment. During the morning no one had touched the ballots. All those present had full opportunity of checking on the accuracy of the answer and the manner in which it was done. No complaint of any kind was made by any person as to the procedure used, or the accuracy of the count. Mr. Lehman was a lawyer. He arrived at the polls at about 7 a.m. and left for lunch about 11:30 a.m. and returned about noon. He testified that when he left the officials had received applications No. 150 or 160; that when he returned about 100 additional applications had been made; that he made a remark about this to Mrs. Goodwin, who replied that the polls had been quite busy during his absence; and that this conversation was only in the presence of Mrs. Goodwin. Lehman testified further that he observed no act of the judges or clerks that might be classified as misconduct. He occasionally found it necessary to leave the polls to visit the toilet. He did not see any person receive more than the proper number

of ballots. All applications were checked against the precinct binder. In his opinion the canvass was properly conducted and accurately recorded on the tally sheets. On cross-examination, he testified that during the day he saw a concentration of white aldermanic ballots up against the window of the ballot box and that the ballots were folded. He made no report to his candidate of any misconduct, or of any circumstances which he thought suspicious. There were two other watchers present in the polling place, namely, Abraham Horwitz and D. S. Cartwright. Neither of these was called as a witness.

Each respondent emphatically denied the several charges of wrongdoing. All testified that they had no knowledge of any wrongful acts having been committed at the polling place and that they had no intimation that they were to be accused of any offense until they were summoned to the Election Commissioners. The respondents then appeared individually at the office of the Election Commissioners and frankly answered all inquiries put to them. They did not refuse to answer any questions. The respondents were unable to offer any explanation to the court concerning the stipulated defects in the applications. They had discussed the matter themselves, had wondered a great deal about it, and still were unable to give any explanation. They testified that they told the whole truth to the court; that they were not seeking to shield or protect any person; and that if they had any idea of the identity of the wrongdoers they would promptly have informed the court.

The parties have cited cases which they contend state the law applicable to the case at bar. We have studied the cases and the statute. Sec. 14.5, Ch. 46, Ill. Rev. Stat. 1945, provides that "such judges and clerks shall thereupon become officers of such court, and shall be liable in a proceeding for contempt for any misbehavior in their office, to be tried in open court on oral testimony in a summary way, without formal pleadings, * * *." The statute, by this

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The parties have cited cases which they contend state the law applicable to the case at bar. We have studied the cases and the statute. Sec. 14.5, Ch. 46, Ill. Rev. Stat. 1949, provides that "such judges and clerks shall thereupon become officers of such court, and shall be liable in a proceeding for contempt for any misbehavior in their office, to be tried in open court on oral testimony in a summary way, without formal pleadings, * * *." The statute, by this

language, requires that the respondents shall be tried in open court on oral testimony in a summary way, without formal pleadings. As a genefal rule at common law, in cases of criminal contempt the answer of the respondent, under oath, purges him of contempt. It has been held that the contempt contemplated by the statute under consideration cannot be said to be a criminal contempt as that term was understood at common law, and that it is not sufficient to purge a respondent that he file a sworn answer denying the charges of misconduct. People v. White, 334 Ill. 465. It is clear that the law contemplates a fair trial. The respondents are presumed to be innocent and the petitioner is required to produce most convincing evidence of the truth of the charges before respondents can be found guilty. Respondents are charged with unlawfully permitting and acquiescing in permitting the filing of false applications; unlawfully permitting and acquiescing in permitting false ballots to be cast; and unlawfully making a false canvass. The first two charges involve intentional omissions and the last, intentional acts of misconduct. Under the charge, guilty knowledge and intention are necessary elements in the case. It is conceded that some person was guilty of misconduct at the polls. The record does not show when, where or by whom the offense was committed. There is nothing to show that the acts were committed in the sight or hearing of the respondents, or that any of them was aware of what took place.

Each respondent testified in his or her own behalf and each sought to cooperate with the court. They had good reputations for honesty and integrity. Officer Goodman, on duty at the polls, saw nothing wrong occur while he was there. No person made any complaint of any kind to him. Victor Lehman, an attorney who was a watcher, did not observe any irregularity. He did not make any report of wrongdoing or misconduct. Respondents were unable to give any explanation of what had occurred and no other person present

language, requires that the respondents shall be tried in open court on oral testimony in a summary way, without formal pleading. As a general rule of common law, in cases of criminal contempt the answer of the respondent, under oath, purges him of contempt. It has been held that the contempt commenced by the statute under consideration cannot be held to be a criminal proceeding as it was understood at common law, and that it is not sufficient to purge a respondent that he file a sworn answer denying the charges of misconduct. People v. Hale, [illegible] Ill. 99. It is [illegible] the law contemplates a fair trial. [illegible] to be innocent and the [illegible] is entitled [illegible] giving evidence of the truth of the charges against [illegible] can be found guilty. [illegible] the authority [illegible] mitting and acquiescing in permitting [illegible] unlawfully committing and acquiescing in permitting [illegible] to be done; and unlawfully making [illegible] a [illegible]. The [illegible] charges involve intentional violations of the law, intentional acts of misconduct. Under the charge, guilty knowledge and intention are necessary elements in the case. It is conceded that some person was guilty of misconduct at the [illegible]. The [illegible] does not show when, where or by whom the offense was committed. There is nothing to show that the acts were committed in the night or morning of the respondents, or that any of them was aware of the book-[illegible].

Each respondent testified in his or her own behalf and each sought to cooperate with the court. They had good reputations for honesty and integrity. Officer [illegible], on duty at the polls, saw nothing wrong occur while he was there. No person made any complaint of any kind to him. Victor Lehman, an attorney who was a watcher, did not observe any irregularity. He did not make any report of wrongdoing or misconduct. Respondents were unable to give any explanation of what had occurred and no other person present

at the polls was able to give the court any plausible explanation. The record indicates strongly that the fraud was perpetrated by outsiders and not by respondents. Respondents suggest that as there was no specific complaint as to the precinct and as no person observed or reported any misconduct, detection of the fraud must have occurred from a general survey of the records and applications, and that the presence of duplicate and triplicate applications was undoubtedly the circumstance which brought the fraud to light. This appears to be a reasonable inference. Respondents argue that if they had committed the offense, they would have avoided duplicate applications merely by checking to determine who had already voted, and that if the guilty person had cooperation from the respondents he could similarly, with their aid, have avoided the duplication of the voters named. We agree with respondents that the presence of duplicate and triplicate sets of applications is a circumstance tending to support their position.

Mrs. Black did not give any person a ballot who did not sign an application. Each voter received only the proper kind and number of ballots. She did not see any person receive more than one application. All applications were compared with the precinct binder. She was at the ballot box and had nothing to do with applications or with checking them. Mrs. Fusco checked the signature on each and every application presented to her. In no case did she find a signature which did not compare with the signature in the precinct binder. She did not see any person receive more than one application. She did not see any person take applications or ballots out of the polling place. Mrs. Goodwin handed out applications to voters as they entered. She knew that the applications were in numerical order and intended to be given out in that manner. In all instances she gave each voter one

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Mrs. Black did not give any person a ballot who did not give an application. Each voter received only one ballot, irrespective of the number of ballots. She did not see any person receive more than one application. All applications were returned with the precinct number. The was at the ballot box and had nothing to do with applications or with obtaining them. Mrs. Tuggs checked the signature on each and every application presented to her. In no case did she find a signature which did not compare with the signature in the precinct binder. She did not see any person receive more than one application. She did not see any person take applications or ballots out of the polling place. Mrs. Goodwin handed out applications to voters as they entered. She knew that the applications were in numerical order and intended to be given out in that manner. In all instances she gave each voter one

and only one application, taking it from the top of the pad. She did not see any person take applications or ballots out of the polling place. Mrs. Goodwin had no method of knowing the identity of persons to whom she gave applications. The only duty performed by Miss Varhol was the filing away of applications after they had been passed to her. She printed the name of the voter thereon and filed them on the spindle in numerical order. Mr. Winget did not approve any applications without checking the signature against the precinct binder and he did not approve any application where the signature did not correspond with the signature in the precinct binder. No application was presented to him except by the voter in person. No forged or spurious application was presented to him. He had no knowledge of any false or spurious applications having been presented to any of the other respondents.

In our opinion the testimony of Mr. Salmon that two persons put cross-marks on 394 ballots was admissible. The attorney for Winget states that it is highly improbable that these ballots ever went into the ballot box and that it is more likely they were put in the pile some way after the votes were dumped on the table for counting after 5 p.m. It does not follow that respondents are guilty because some unknown person performed fraudulent or criminal acts. To justify a judgment of conviction there must be convincing evidence of the guilt or respondents. The petition alleged that respondents knowingly and fraudulently permitted and acquiesced in permitting the commission of various illegal acts at thepolls and that they were guilty of corrupt and fraudulent misconduct. The judgment order followed the allegations of the petition. Under the record, the judgment cannot stand. Therefore, the judgment of the County Court of Cook County is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

KILEY, P.J. CONCURS.

LEWE, J. TOOK NO PART.

and only one application, taking it from the top of the pad. She did not see any person take application or deposit it at the polling place. Mrs. Goodwin had no method of knowing the identity of persons to whom she gave application blanks. The only duty performed by Mrs. V was the filling away of application blanks after they had been passed to her. She pointed the name of the voter thereon and filed them in an envelope in numerical order. Mr. Hagerty did not remove any applications without checking the signature against the precinct register and he did not approve any application where the signature did not correspond with the signature in the precinct register. No voting machine was presented to him except by the voter in person. No ballot or voting machine was presented to him. He has no knowledge of any ballot or voting machine applications having been mailed to any of the other precincts.

In our opinion the testimony of Mr. Gilmore that he received out-of-state ballots on 7th ballots was substantial. The statement of Hagerty states that it is highly improbable that the ballots were put into the ballot box and that it is more likely they were put in some way after the voter were passed on the table for counting after 6 p.m. It does not follow that respondents are guilty of some unknown person conspiracy involving an illegal act. To justify a judgment of conviction there must be overwhelming evidence of the guilt or responsibility. The petition alleged that respondents knowingly and fraudulently permitted and countenanced in violation the commission of various illegal acts at the polls and that they were guilty of corrupt and fraudulent misconduct. The judgment order followed the allegations of the petition. Under the record, the judgment cannot stand. Therefore, the judgment of the County Court of Cook County is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

KILEY, P.J. DISSENTS.

LEWE, J. TOOK NO PART.

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| KASIA SYROISHKA, Appellant, | ) | APPEAL FROM |
| v. | ) | MUNICIPAL COURT |
| ALBERT PIENIOZEK, Appellee. | ) | OF CHICAGO. |



MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 3, 1944, Kasia Syroishka filed her verified statement of claim in the Municipal Court of Chicago against Albert Pieniozek, alleging that she was lawfully entitled to the possession of a certain 1941 model Chevrolet sedan automobile and asking for a writ of replevin. She alleged that the value of the automobile did not exceed $500. The bailiff served the writ of replevin, whereupon defendant gave a forthcoming bond in the sum of $2,000. Defendant in a "Defence" denied that plaintiff was entitled to possession of the automobile; denied that he wrongfully retained possession; alleged that he purchased the automobile on or about September 29, 1943; that he obtained a certificate of title from the Secretary of State, issued to him as the owner of the automobile; that he was issued licenses in his name for the operation of the automobile for the years 1943 and 1944; and that he bought the car in good faith from Stella Murray, who also had a certificate of title issued by the Secretary of State. A trial before the court without a jury resulted in a finding and judgment for defendant. Plaintiff appeals.

Plaintiff, testifying in her own behalf on July 12, 1944, introduced a certified copy of a decree entered in the Circuit Court of Cook County on March 19, 1942, in a complaint filed by her against Harry Syroishka. The decree is headed "Decree for separate maintenance". The decree finds that plaintiff was possessed of a personal estate of over $12,000 "as evidenced by savings accounts,

stocks and bonds, prior to her marriage to the defendant on July 2, 1931"; that the defendant Harry Syroishka had little or no money prior to his marriage to plaintiff herein; that the property accumulated by the parties subsequent to their marriage was the result of the sole efforts of plaintiff, and that "in equity and good conscience is her sole property and should be returned to her"; that plaintiff's funds were used to purchase six certain Treasury Bonds in denominations of $1,000 each, made out to "Mr. Harry Syroishka or Mrs. Mamie Syroishka"; that the bonds are in equity and good conscience the property of Kasia Syroishka; that plaintiff proved the allegations of her complaint; that defendant failed to substantiate his defense; that plaintiff is the lawful owner of all of the household property owned by the parties and now in her possession; that her husband testified evasively concerning his assets; that he has other property which he failed and refused to disclose, particularly a savings account in a Canadian bank; that jurisdiction of the cause should be retained for the purpose of enforcing the terms of the decree; that the defendant Harry Syroishka had registered in his name a certain Chevrolet sedan "which property this court expressly finds to have been purchased with funds belonging to plaintiff, and that, therefore, this motor vehicle is the property of the plaintiff and should be redelivered to her instanter"; that he should pay the sum of $300 for attorney's fees; that he should also pay $358 on account of moneys expended by her in prosecuting her complaint; that he failed to attend the final hearings and that although notified, he refused to appear in court; that the sheriff should take into custody the Chevrolet sedan automobile and deliver it to plaintiff; and that she should be allowed a decree of separate maintenance, with the matter of support reserved until such future time as she may desire an order for her support upon proper showing. The court decreed that she was entitled to separate main-

tenance, with the matter of support being reserved for future determination; that she was decreed to be the lawful owner of the six $1,000 Treasury Bonds; that he, Harry Syroishka shall deliver the bonds to plaintiff or to her attorney within three days from the entry of the decree; that should he fail to deliver the bonds, a master in chancery was directed to execute all necessary documents in the name of Harry Syroishka for the purpose of obtaining duplicates of the bonds; that the master be further empowered to execute an application for a certificate of title to the motor vehicle then registered in the name of Harry Syroishka, the costs to be taxed against Harry Syroishka; that he pay her within three days $358.40 on account of certain expenditures made by her; that he pay her $300 as attorney's fees; that she is the lawful owner of the Chevrolet sedan automobile and that the Secretary of State is "hereby directed to issue to the plaintiff a new certificate of title in her name, free and clear of any encumbrances which may have been recorded against said motor vehicle since January 10, 1941, and she is hereby declared to be the lawful owner of said motor vehicle nunc pro tunc January 10, 1941." It was further decreed that the clerk of the court certify a copy of the decree to be delivered to the Sheriff of Cook County and the Sheriff was commanded to take into his "custody" the Chevrolet sedan automobile and to deliver it to plaintiff; that Harry Syroishka was ordered to execute any and all necessary documents to effectuate the transfer of title to the government bonds and title to the motor vehicle, and "such other matters as may be required of him for the performance of the duties under this decree"; that should he refuse to comply with the terms of the decree by failing to transfer and deliver possession and title of the bonds and motor vehicle, that he be committed to the County Jail, there to remain until such property and title thereto have been transferred to the

[illegible]

plaintiff, and until he shall have satisfied all of the terms of the decree. It was further ordered that Harry Syroishka be restrained from leaving "the city of Chicago, County of Cook, Illinois" until he shall have fully complied with the terms of the decree; that the court "retain jurisdiction of this cause for the purpose of enforcing this decree, and that this decree be entered nunc pro tunc as of the date of the entry of the original decree, March 2, 1942."

Plaintiff testified further that there was no appeal from the decree; that she did not sell the automobile; that she did not borrow money on it; that on April 8, 1942 a certificate of title was issued to her by the Secretary of State; that the first time she saw the automobile since the decree was entered was a few days before the bailiff took possession of it under the writ of replevin. On cross-examination, she testified that she knew where her husband lived at the time the decree was entered; that she knew he had the automobile; that after the decree was entered, at her instance, her husband was imprisoned in the County Jail; that he was there six or seven months; that after he was released he remained in Chicago; that she saw him after he was released; that she saw him on Wood Street at the barber shop where he worked; that she did not see the car there; that he lived in a hotel at 1166 Milwaukee Avenue, Chicago; that she saw him quite a few times after he was released from jail; that he was in jail at the time she was testifying; that she spoke to him on the day he was picked up on Adams Street, which was four or five weeks previous to the time she was testifying and at which time he had possession of the car; that then she asked him for the automobile and that that was the first time she asked him for the automobile since the decree was entered. An employee of the Secretary of State, testifying for plaintiff, produced photostatic copies of applications for certificates of title and certificates of title. The application

plaintiff, and until he shall have satisfied all of the terms and [illegible] decree. Ittner further ordered that Henry [illegible] restraining from leaving the city of Chicago, County of [illegible], [illegible] until he shall have fully complied with the terms of the decree; that the court retain jurisdiction of the cause for the purpose of enforcing this decree, and that this decree be entered nunc pro tunc as of the date of the entry of the [illegible] decree, [illegible].

Defendant [illegible] the decree; that he did not [illegible] borrow money on it; that on April 6, [illegible] was issued to [illegible] son the automobile [illegible] before the bailiff took [illegible] on cross-examination, the [illegible] "Have [illegible] the time to [illegible] automobile; that after the [illegible] husband was imprisoned in the [illegible] seven months; that [illegible] the service in [illegible] at the brother-in-law's [illegible] that he lived in a hotel at [illegible] seemingly quite a few times after [illegible] was in jail at the time the [illegible] on the day before [illegible] weeks previous to the time the [illegible] had possession of the car; that then [illegible] and that that was the first time [illegible] the decree was entered. In an [illegible] testifying for plaintiff, produced a [illegible] for certificates of title and certificates of title. The [illegible]

by Harry Syroishka was made on January 21, 1941 and filed in the office of the Secretary of State on January 24, 1941. Therein he stated that he purchased the automobile, which was a new car, on January 20, 1941 by bill of sale from Ruby Chevrolet, Inc., located at 1147 West Jackson Boulevard, Chicago. The certificate of title was issued to him on January 24, 1941, and was assigned to Stella Murray on May 1, 1943. On that date Stella Murray made application for a certificate of title in her name. On May 5, 1943 a certificate of title was issued in her name. On July 15, 1943 Stella Murray assigned the certificate of title to Albert Pieniozek, defendant herein. On September 24, 1943 defendant filed his application for a certificate of title, stating that he purchased the car by bill of sale from Stella Murray on July 15, 1943 and on September 29, 1943 a certificate of title was issued to defendant.

Stella Murray, called by defendant, testified that she purchased the automobile from Harry Syroishka in May, 1943; that she and her husband knew him for about ten years; that Harry Syroishka was a barber and that her husband used to have his hair cut by Syroishka; that she paid him $650.00 for the car, which was in cash; that she wasn't acquainted with plaintiff, but saw her in the neighborhood occasionally; that she did not know plaintiff had any claim to the automobile; that Harry Syroishka gave her the certificate of title; that she sent it to the Secretary of State; that she applied for a certificate of title and also for the automobile licenses, both of which were issued to her; that she kept the automobile for four months; that then she sold it to Albert Pieniozek; that she gave Pieniozek a transfer of title; that defendant paid her $850 in cash for the car; and that at that time she did not know that plaintiff made any claim to the automobile. On cross-examination, she testified that she examined the car before purchasing it; that the value of the car was more than what she paid for it and that that was why she

by Harry [illegible] was [illegible] in the
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made any claim to the automobile. On cross-examination, the testimony
that she examined the car before purchasing it; that the value of
the car was more than what she paid for it and [illegible]

was interested. Asked as to whether the blue book value at the time she was testifying was $1,250, and as to whether she had an idea as to the value of the car, she answered: "No, I just thought it was a good buy at $650. That is why I was interested." She testified further that she knew the defendant and that her husband had known him for years. Defendant, called in his own behalf, testified that he purchased the automobile from Stella Murray for $850 in cash; that he sent the title to the Secretary of State; that the automobile has been in his possession since it was delivered to him by Mrs. Murray; that he applied for and obtained a license to operate the car in 1943 and 1944; that the car was taken away from him by the bailiff under the writ of replevin on June 3, 1944; that it was restored to him by virtue of a forthcoming bond; that he lives in the same neighborhood as plaintiff; that they patronize the same restaurant; that he did not know that she claimed the car; that he did not obtain a receipt for the $850 which he paid to Mrs. Murray; that he felt that the "title" was sufficient to prove ownership of the automobie; and that he did not know Harry Syroishka.

Plaintiff asserts that she could not be divested of her sole and absolute title to the automobile by reason of its purported sale by her husband. Citing Fawcett Isham & Co. v. Osborn Adams & CO. 32 Ill. 411, and other cases. The parties are in agreement that the uniform motor vehicle anti-theft act is not a recording statute, and that a certificate of title issued pursuant thereto could not divest plaintiff or defendant of any title she or he had in the automobile. L. B. Motors, Inc. v. Prichard, 303 Ill. App. 318; Smith v. Rust, 310 Ill. App. 47. At the time of the respective transactions the parties involved placed great reliance on the certificates of title issued under the motor vehicle anti-theft act. The record shows that the automobile was purchased from Ruby Chevrolet, Inc., by Harry Syroishka on January 20, 1941 and that the licenses for

the operation of the car were issued to him. The Circuit Court found that the car was purchased with funds belonging to plaintiff and decided that in equity and good conscience the motor vehicle was the property of plaintiff and that it should be delivered to her. The decree directed that a master in chancery be empowered to execute an application for certificate of title in the name of the plaintiff. The Secretary of State was directed to issue a certificate in her name free and clear of all encumbrances. The decree contemplated that a certified copy thereof would be delivered to the Sheriff of Cook County, who was commanded to seize the motor vehicle and deliver it to plaintiff, and directed Harry Syroishka to execute all necessary documents to effectuate the transfer of title to plaintiff. The court retained jurisdiction to enforce all the terms of the decree. The record is silent as to whether a certified copy of the decree was delivered to the Sheriff, and also as to what action, if any, the Sheriff took. A certified copy of the decree was sent to the Secretary of State, who, pursuant thereto, issued a certificate of title in the name of plaintiff. The record does not disclose whether Harry Syroishka was required to execute any documents effectuating the transfer of title to the motor vehicle to plaintiff. It is apparent, however, that he did not execute any documents transferring the title to plaintiff. According to the testimony of plaintiff, shortly after the decree was entered her husband was lodged in the County Jail for about six months. A fair inference is that his imprisonment was the result of action taken on the part of plaintiff because of his failure to comply with some part of the decree. Presumably, he was released in the Fall of 1942. He was again apprehended about a month before the trial of the instant case. From the fact that plaintiff forwarded a copy of the decree to the Secretary of State to procure a certificate of title in her name, and that nothing further was done, it appears that she was satisfied

that such action was sufficient to transfer title to her. The record shows that Harry Syroishka was employed as a barber and that plaintiff knew where to find him. The fact that he was twice committed to the County Jail by the Circuit Court does not show that this action was in an endeavor to force compliance with the part of the decree which required delivery of the motor vehicle. He was required to turn over six Treasury Bonds, to pay attorney's fees and expenses incurred, to disclose the whereabouts of other assets, particularly a savings account in a Canadian bank, and the court reserved the matter of entering an order requiring him to support her. Plaintiff testified that the first time she asked him for the automobile after the decree was entered was about a month before the instant action was commenced. We agree with defendant that the decree did not transfer the title to the automobile to plaintiff, nor does it appear that anyone appointed by the chancellor executed a transfer of the title for Harry Syroishka. The action of the Secretary of State in issuing a certificate of title in her name based on the decree was ineffective. The chancellor in entering the decree recognized that the legal title to the motor vehicle was in Harry Syroishka and he sought to give effect to her equitable rights by directing a transfer of the title and delivery of the motor vehicle to plaintiff. However, the decree was not carried out and the record does not show what, if any, effort was made to have the portion of the decree directing delivery of the motor vehicle obeyed. The Circuit Court had the power to enforce its decree and Harry Syroishka was within its jurisdiction.

Plaintiff maintains that the purported sale of the car made by her husband was fraudulent and that the purchaser acquired no title to the automobile. The evidence shows that Stella Murray purchased the car from Harry Syroishka for $650 and that she sold it to defendant for $850. We have read the transcript of the testimony and do not find any evidence of fraud. Defendant urges that plaintiff

is estopped by her acts and conduct to assert her claim of ownership against a bona fide purchaser whose title and possession was acquired from one taking from the husband who had been vested with title by plaintiff. When the automobile was purchased, title was taken in the name of her husband. He drove the car and retained possession of it until he sold it to Mrs. Murray fourteen months after the decree was entered. Defendant acquired the car from Mrs. Murray four months after she had taken possession of it. We agree with defendant that plaintiff did not justify her conduct in allowing her husband's release from jail without having him comply with the terms of the decree. We also agree with defendant that the acts of plaintiff in permitting her husband to appear as the owner of the car, in allowing him to be released from confinement without requiring compliance with that part of the decree directing delivery of the car to her, in failing to have the court appoint a commissioner to transfer title to the car by executing a transfer in the husband's name, and the fact that more than a year intervened between the entry of the decree and the sale by the husband, constitute acts of estoppel which prevent her from asserting her claim of ownership against an innocent purchaser for value who had no knowledge of her equitable claims against her husband. Par. 1, Sec. 23, Ch. 121½, Ill. Rev. Stat. 1943, reads:

"Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In Sec. 463, 46 Am. Jur. under the title "Sales", the author states:

"The general rule, applicable to property other than negotiable securities, that the seller can convey no greater right or title than he has, is only predicable of a simple transfer from one person to another where no other element intervenes. It does not interfere with the well-established principle that where the

true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third persons are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the person with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the person making the transfer. This rule has, in some instances, been incorporated into the statutes. Strictly speaking, this is merely a special application of the broad equitable rule that where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall on him by whose act or omission the wrongdoer has been enabled to commit the fraud."

If we assume that plaintiff had the legal title to the motor vehicle, the principle above enunciated applies. In Sec. 464 of the same publication, the author states:

"While as a general rule bona fide purchasers are favorites of the law, and the policy of the law has always been to protect them, in the absence of an estoppel, even a bona fide purchaser of personal property from one who does not have title or the right to sell is not protected from the holder of the legal title. In the absence of an estoppel, the bona fide purchaser is protected only from equitable rights. Where, however, a bona fide purchaser buys from one who has legal title or the right to sell and the legal title passes as between the parties, he takes title free from equitable rights of which he has no notice."

As we have seen, the motor vehicle was purchased in the name of Harry Syroishka. Hence, the legal title was in him. Plaintiff claims it was purchased with her funds. He had the legal title and exercised all of the rights of an owner. She knew this and by the decree sought to obtain the legal title and possession. When Stella Murray and defendant, respectively, purchased the car from plaintiff's husband, Stella, and in turn defendant, took the title free from the equitable rights of plaintiff, of which they had no notice.

In her brief plaintiff, anticipating that defendant would advance the proposition that she was estopped by her conduct in asserting title, argues that she is not chargeable with any act of estoppel to assert her sole and absolute title to the auto-

mobile. Defendant argues that she is so estopped. Plaintiff asserts that defendant did not try the case on the theory of estoppel and that he is precluded from advancing that theory in this court. The law is well settled that a person cannot try a case on one theory in the trial court and on another theory in a court of review. This court reviews a case presented to the trial court and does not sit to try issues presented for the first time in this court. It is equally well settled that an appellee has the right to sustain the judgment upon any ground warranted by the record. All presumptions are in favor of the validity of the judgment. The pleadings and the record present the points urged by defendant for reversal. The record shows that the attorneys argued the case before the trial judge, but the argument is not preserved in the record. Therefore, we do not know what points were argued to the court. However, there is basis in the record for all the points urged here by defendant. For the reasons stated, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND LEWE, J. CONCUR.

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| CONSOLIDATED WIRE AND ASSOCIATED CORPORATIONS, Appellee, | ) | APPEAL FROM |
| v. | ) | SUPERIOR COURT |
| RUDOLPH WEISS, doing business as ARROW SALES COMPANY, Appellant. | ) | COOK COUNTY. |



MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an amended complaint filed in the Superior Court of Cook County, Consolidated Wire and Associated Corporations, a corporation, sought damages against Rudolph Weiss, trading as Arrow Sales Company, for an alleged breach of contract arising out of the failure of defendant to deliver certain wire. Defendant, answering, denied that he sold the wire to plaintiff, or that plaintiff suffered any loss. Defendant in his answer set up the additional defense that the transaction was an accommodation to plaintiff and that there was no contract relationship between them with respect to the purchase of the wire. A trial before the court and a jury resulted in a verdict against defendant for $4,000. Motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial were denied and judgment was entered on the verdict, to reverse which this appeal is prosecuted.

Plaintiff corporation is a jobber of electrical and radio wires, cables and cordage and has been in that line of business for about 25 years. It jobs and distributes all different types of electrical copper wire products. It buys such items from "regular manufacturers" and in addition purchases surplus and excessive stocks from "actual manufacturers" and from manufacturers using such items in the manufacture of their products. Plaintiff did not deal in junk. Joe G. Mann is president and Paul L. Mann, his

brother, is treasurer. Joe G. Mann knew the defendant for 25 years. Defendant conducted the business of buying and selling radio parts, surplus merchandise, and the building of amplifiers under the name of Arrow Sales Company, not incorporated. He had two employees, Roy Rogers, who worked in the shop building amplifiers in which transformers were used, and in the office a stenographer, Miss. B. Gleicher, 23 years of age.

Louis Poncher had been a dealer in surplus radio parts for 15 years. He had known the Mann brothers as executives of plaintiff company for about 10 years and had many deals with them, buying and selling for them and selling to them surplus wire purchased from factories in the radio industry. These factories would call in buyers of surplus wire. There were many such buyers. Joe Mann said plaintiff had as many as 50 separate deals with Poncher in which plaintiff was the seller and that the transaction out of which the instant action arose was the first in which plaintiff had bought anything from Poncher. Poncher visited the office of plaintiff prior to the transaction about once a week, made telephone calls from there and had a desk at the office of plaintiff subsequent to the transaction. Poncher also visited the office of defendant about once a week and sometimes made telephone calls from defendant's office, but did not call up his customers from that office, did not have a desk at defendant's office and did not dictate letters or contracts to defendant's stenographer, nor did she do any work for him. Poncher paid for the telephone calls he made from defendant's office.

The places of business of plaintiff and defendant are in Chicago. About February 16, 1940 Poncher purchased from Jefferson Electric Company of Bellwood, Illinois, a suburb of Chicago, a quantity of wire, radio transformers and nuts and bolts for $2,250.00 and paid down $250.00 on the purchase price. The purchase invoice was in the name of Bob Grace, who advanced the $250.00. About

brother, is treasurer. Joe G. [illegible] knew the defendant for [illegible] years. Defendant conducted the business of buying and selling radio parts, surplus merchandise, and the building of amplifiers under the name of Arrow Sales Company, not incorporated. He had [illegible] employees, any agents, who worked in the store building amplifiers in which transformers were used, and in the office [illegible], [illegible], stockholder, 22 years of age.

Louis Gonzer [illegible] for 14 years. He has known [illegible] plaintiff company for about [illegible] years. [illegible] buying and selling for them and [illegible] from factories in the radio [illegible] in lengths of one inch wire. [illegible] said plaintiff has been [illegible] which plaintiff was the sale [illegible] the last [illegible] anything from another, [illegible] prior to the transaction [illegible] from there [illegible] the transaction [illegible] once a week [illegible] but did not call on his customers from [illegible] desk at defendant's office [illegible] to defendant's stenographer, [illegible] said for the telephone calls he made from defendant's [illegible].

The place of business of plaintiff and defendant is Chicago. About February 16, 1940 Gonzer purchased from Jefferson Electric Company of Bellwood, Illinois, a suburb of Chicago, a quantity of wire, radio transformers and nuts and bolts for $3,200.00 and paid down $250.00 on the purchase price. The purchase invoice was in the name of Bob Grace, who advanced the $250.00. About

February 18, 1940 Poncher called on plaintiff and spoke to Joe Mann. Poncher submitted a written list of magnetic wire for sale. A paper was attached showing the individual weights of the various items to be sold. After some discussion the price was set at $1,050.00. Poncher represented that most of the wire was in the original packages at the Jefferson Electric Company in Bellwood. Joe Mann and Poncher went to the plant of the Jefferson Electric Company on February 19, 1940 for the purpose of seeing the wire. Rogers, who worked for defendant, went there to inspect the transformers which defendant was interested in buying. The cases were piled one on top of another and merchandise on top of that. Mann saw some of the wire and Poncher assured him that everything was according to the list.

The next day, February 20, 1940, Poncher returned to plaintiff's office and secured three typewritten orders in accordance with the itemized list. Plaintiff handed a letter to Poncher addressed to defendant and attached three purchase orders. The letter stated that the orders were tendered subject to defendant's immediate acceptance and delivery. The orders were addressed to defendant under his trade name. Poncher took the orders and letter to the office of defendant, where they were accepted on defendant's business letterhead by Miss Gleicher. There was testimony that she was in charge of defendant's office. Plaintiff, by check, paid the full purchase price to defendant, which defendant accepted and retained. Defendant partially complied with the contract, but there were shortages for which the damages arose and for which the instant action was brought. Plaintiff delivered to defendant lists of the merchandise received and the shortages under the contract and called on defendant to correct his default. There was testimony that defendant later promised to supply the shortages. Defendant was absent from Chicago from February 14, 1940 to March 12, 1940. He was in Houston, Texas.

The wire constituting part of the order was shipped by Jefferson Electric Company to plaintiff company direct on March 11, 1940. Defendant testified that he first heard of the orders for the material shortly after his return from Houston; that on March 16, 1940 he spoke to Joe Mann, who complained of shortages in the order; that he then told Joe Mann that he knew nothing about it and that Mann should get in touch with Poncher; that Mann said he would take it up with Poncher and that there was no further conversation.

Poncher testified that the letter of acceptance was prepared by Paul L. Mann, that Poncher then took it to the office of defendant, had the office girl write it on defendant's stationery and sign it and that he then took it back to Mann. He testified further that he saw Paul Mann when he later went to plaintiff's office to get the check; that Paul Mann would not give him a check and would not make one out to the Jefferson Electric Company; that on a later date Poncher told Paul Mann that defendant had bought the transformers and asked him for his check, stating that he would then pay the Jefferson Electric Company the balance of its bill; that Paul Mann then said that as long as defendant had bought the transformers, let him, defendant, pay for the whole thing and that plaintiff would give defendant the check so that the latter could pay off the balance on the material; that Paul Mann then called in his bookkeeper and had the check made out to defendant for $1,050 and gave Poncher the check and the orders; that Paul Mann then wrote the letter to defendant and told Poncher to take it and the check to defendant's office, which Poncher did; and that the balance of the bill of the Jefferson Electric Company for the surplus material, including the transformers, was paid. In this summary we have presented the testimony in its aspect most favorable to plaintiff.

The wire constituting part of the order was entered by [illegible] from Electric Company to plaintiff [illegible] directed [illegible] defendant instructed [illegible] shortly after his return from Europe; [illegible] apolo to Joe Mum, who [illegible] he then told Joe [illegible] should get in touch with [illegible] us with [illegible]

Further testimony [illegible] presented by [illegible] of dotom sut, [illegible] and sign it and [illegible] further that [illegible] refuse to get the [illegible] and would not [illegible] on a letter date [illegible] the transcript [illegible] then by the defendant [illegible] Joel Mum then [illegible] forward, let him [illegible] would give defendant the [illegible] balance on the material [illegible] and had the check made out [illegible] the check and the order [illegible] defendant and told [illegible] office, which number [illegible] Jefferson Electric Company for the [illegible] transformers, was sold. In this [illegible] money in its repect most favorable to plaintiff.

Defendant maintains that the minds of the parties did not meet and that there was no contract between them. There is evidence supporting defendant's contention that the wire was sold to plaintiff by Poncher and that defendant accepted plaintiff's check as an accommodation to plaintiff. In our opinion there was competent testimony to establish that the contract was between plaintiff and defendant and that the minds of the parties met. It is evident that the jury believed the evidence that was favorable to plaintiff's contention and rejected defendant's theory. There is ample support in the record for the jury's finding.

Defendant urges that the court did not permit him to develop his case in full and allowed only certain phases of the issues to go to the jury. We find that defendant was permitted to introduce his theory of the case and that in so doing he was not improperly restricted. He asserts that there was no proof of what items of wire were received by plaintiff so as to ascertain the claimed shortage. Plaintiff proved what items of wire were and were not received by it.

The court gave four instructions mentioning the measure of damages. Instruction No. 2 states that the measure is the difference between the contract price and the open market price at delivery time. No. 4 says the general rule is that the measure is the loss sustained by failure to perform. No. 6 says that the measure will be the difference between the contract price and the price and value of the articles in the location where they are to be delivered at the date of the breach of the contract. No. 7 says that the measure is the difference between the contract price and the market price of that part not delivered. No. 7 repeats the abstract proposition contained in No. 4 and the measure given in No. 2. Defendant states that the instructions on the measure of damages were based on a misconception of the law; that surplus goods are an excess of materials resulting from slow sales, change in models, etc.; materials purchased for

Defendant maintains that the minds of the parties in not meet and that there was no contract between them. There is evidence supporting defendant's contention that the [illegible] by Fonoher and that defendant [illegible] accommodation to [illegible]. In one [illegible] money to satisfied that [illegible] defendant and that the [illegible] the jury [illegible] contention and [illegible] in the record for the jury's [illegible].

Defendant [illegible] develop his case [illegible] to go to the jury. [illegible] his theory of the [illegible] established. [illegible] were received by [illegible] Plaintiff proved [illegible].

The court [illegible] charge. Instruction No. 2 [illegible] by them the contract [illegible] No. 4 [illegible] by failure to perform. No. [illegible] difference between the [illegible] articles in the location where they are to [illegible] the breach of the contract. No. 7 [illegible] difference between the contract price and the market price of the part not delivered. No. 7 repeats the objection [illegible] in No. 4 and the measure given in No. 6. Defendant argues that the instructions on the measure of damages were based on a misconception of the law; that surplus goods are an excess of materials resulting from slow sales, change in models, etc.; materials unnecessary for

which there is no longer any use; wire which the manufacturer has left over; and that surplus materials are not bought or sold at market prices nor on the open market. There was evidence that the wire was new. Plaintiff was a legitimate dealer and did not deal in junk. Plaintiff's orders for the merchandise specified the quantities in pounds, the description of the types of wire and the kind of spools on which the wire was wound, and the merchandise was at all times treated by both parties as clean, new wire. Plaintiff introduced testimony as to the market prices of the type of wire involved in the case and as to the prevailing market prices at the time of the breach. Defendant made no attempt to refute this testimony. Plaintiff paid defendant the full purchase price of the wire. There was evidence that defendant defaulted in delivery. Like wire was on the market. The market price of the shortages was the measure of the damages and was properly applied by the trial court. In Benjamin Harris v. Western Smelting & Refining Co., 313 Ill. App. 455, we said (483):

> "The law of this State is that the vendee may recover as damages against the vendor the difference between the contract price and the market price, without making any purchases, the result being the same and the vendee being entitled to the benefit of his contract. (Summers v. Hibbard, Spencer, Bartlett & Co., 153 Ill. 102.)"

The court correctly instructed the jury on the measure of damages. Defendant complains that the court gave undue prominence to the element of damages by stating it four times in seven instructions, and that taken with the abstract nature of instructions Nos. 1, 3 and 4, such repetition of the subject of damages was calculated to impress the jury with an idea that the court regarded the proof of liability of defendant to have been made out to the satisfaction of the jury. The jury was plainly told that plaintiff must carry its burden of proof by a preponderance of the evidence before damages could be allowed. In view of all the instructions, no undue emphasis was given to the question of damages. Defendant insists that his theory of defense was ignored in the instructions given

for plaintiff. We agree with plaintiff that defendant was given a full opportunity to introduce and that he did introduce his theory of defense. Defendant asked for no special instructions on the "accommodation theory". We cannot agree with defendant's contention that the instructions tended to restrict the jury to a consideration of the face of the written orders, the acceptance letter and shortage of articles on delivery and to exclude the defendant's affirmative defense from the jury.

Plaintiff's instruction No. 5 tells the jury that if they believe from the evidence "that any witness in this case has knowingly and wilfully sworn falsely on this trial to any matter material to the issue in this case, then the jury are at liberty to disregard the entire testimony of such witness except so far as it has been corroborated by other creditable evidence, or by facts and circumstances proved on the trial". Defendant states that an examination of the other instructions fails to show any instruction in which the jury are advised as to what are matters "material to the issue in this case", thus leaving a question of law to the jury. He also argues that the jury was given no guide in the matter as to what was the "issue" or what were matters material to the issue, and that the jury could well infer that there was but one issue before them, whereas the defendant was tendering an issue as well as the plaintiff. Defendant relies on People v. Flynn, 378 Ill. 351; People v. Wells, 380 Ill. 347; and Farm Food Stores v. Miller, 323 Ill. App. 651. It will be observed that in the Wells case the Supreme Court refused to reverse for such an instruction. We agree with plaintiff that instructions were given covering all the material aspects of the case. Defendant was not harmed by the giving of the instruction complained of. Defendant also charges that the court erred in giving certain abstract instructions, citing People v. Corbishly, 327 Ill. 312, where the court said (338):

for plaintiff. We agree with [illegible] that defendant was given a full opportunity to introduce [illegible] his theory of defense. Defendant asked for [illegible] instructions on the "accommodation theory". [illegible] with defendant's contention that the instructions tended to [illegible] the jury to a consideration of the face of the written order, the [illegible] of articles on delivery [illegible] defense from the jury.

Plaintiff's instruction [illegible] believe from the evidence [illegible] knowingly and willfully [illegible] material to the issue in this [illegible] to disregard the [illegible] as it has been [illegible] facts and circumstances [illegible]". [illegible] that an examination of [illegible] instruction in which the jury are [illegible] "material to the issue in this case" [illegible] law to the jury. [illegible] in the matter of [illegible] to the issue, [illegible] but one issue before the [illegible] issue as well as the plaintiff. [illegible] People v. Lynn, 270 Ill. 301; People v. Wells, 280 Ill. [illegible]; [illegible] Miller, 283 Ill. [illegible]. It will be observed that in the Wells case the Supreme Court refused to reverse for such an instruction. We agree with plaintiff that instructions were given covering all the material aspects of the case. Defendant was not harmed by the giving of the instruction complained of. Defendant also argues that the court erred in giving certain abstract instructions, citing People v. Corbishley, 287 Ill. 312, where the court said ([illegible]):

"The vice of giving abstract propositions of law as instructions to a jury is, that the jury are too liable to arrive at the conclusion that the court thinks that the facts stated in such instruction on which the proposition of law is based have been proved, while the law is that the jury should be required to make the proper finding on such facts." He complains particularly about the giving of instructions Nos. 3 and 4. The instructions should be read as a series. We do not find any reversible error in the giving of the instructions.

Defendant argues that the court ignored his substantive defense and did not permit him to develop it. We cannot agree with defendant. He was given full opportunity to defend. Finding no reversible error, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND LEWE, J. CONCUR.

"The vice of giving abstract propositions of law [illegible] to a jury is, that the jury are too liable to receive [illegible] that the court thinks [illegible] on which the proposition of [illegible] the law is that [illegible] on such facts." [illegible]

[illegible]

defense and did not [illegible] defendant. [illegible] reversible error, the [illegible] is affirmed.

[illegible]

[illegible]

42811

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| WESTERN ENGINEERING CO., a corp., Appellee, v. MILLER - CONNELL MANUFACTURING CO., a corp., Appellant. | ) | APPEAL FROM SUPERIOR COURT COOK COUNTY. |



MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant and counterclaimant seeks reversal of a decree dismissing the counterclaim and entering a judgment in the sum of $3,861.37 in favor of plaintiff, for royalties due under the terms of a written license agreement executed by the plaintiff as licensor and defendant as licensee, and referring the cause to a master in chancery for an accounting of the licensed devices manufactured and sold and any damages sustained by plaintiff.

Defendant, a manufacturer of venetian blinds, was granted "an exclusive nontransferable license" by the plaintiff, "to manufacture, use and sell devices constructed in accordance with the inventions" of Michael J. Nardulli, plaintiff's president and the owner of certain letters patent. One of the patented features was a rotary blind and the other relates to the arrangement of blind-elevating cords. The rotary blind differs from the ordinary type of venetian blind in that the rotary blind can be raised or tilted in one operation, whereas the ordinary type of venetian blind is raised and lowered by a cord on one side and tilted by a cord on the other side. The license agreement, covering eight pages of the abstract of record, was executed on November 25, 1939. The pertinent provisions are contained in paragraphs 5, 15 and 16, which read as follows:

"5. It is covenanted and agreed by the parties hereto that no minimum requirements shall obtain during the year of 1940, and that the minimum royalties shall be due and payable to licensor during the year of 1941 on business aggregating One Hundred Thousand Dollars ($100,000.00) during said second year, and the minimum royalty on business aggregating Two Hundred Thousand Dollars ($200,000.00) during the year 1942 and succeeding years. In the event the minimum requirements, as herein set forth, are not met by licensee, then the licensor shall have the right, by giving notice as provided in paragraph 15 hereof, to convert this exclusive license into a non-exclusive license, provided the defaults then committed shall not have been cured within three months from the date of such notice. Should the minimum net business during 1942 or any succeeding year be less than half of the minimum business herein specified, then the licensor may, at its option, terminate the within agreement."

"15. For a period of two years, this license shall be non-cancellable, except for non-payment of accrued royalties, and thereafter, in case licensee shall default or fail to carry out any of the provisions of this License Agreement, Licensor shall have the right upon six (6) months' notice in writing, to terminate this agreement, provided that if within ninety days from such notice licensee shall fully rectify said default or failure, and shall present proper and satisfactory proof thereof to licensor, then in such case the notice shall be withdrawn, and the agreement shall not be thereby terminated, but any termination of this agreement shall not release licensee from the payment of any royalties which might be due licensor, nor from the fulfillment of any of its other obligations to licensor under this agreement."

"16. Licensee shall have the right to cancel this agreement and to be relieved from further obligation thereunder, upon giving licensor six (6) months notice in writing to that effect, without, however, being released from the payment of royalties accrued at the date of termination."

The bill of complaint alleged that notice of cancellation was given plaintiff by defendant on July 28, 1941, pursuant to the provisions of paragraph 16; that between November 25, 1939 and January 28, 1942, the defendant manufactured and sold licensed venetian blinds but failed to render monthly statements, "nor did said defendant pay the plaintiff the minimum royalty payments for the year 1941 and for 28 days of the year 1942," and concluded with a prayer for an accounting. Defendant's answer admits the cancellation of the license agreement pursuant to paragraph 16, and avers, "that prior to November 25, 1939, in order to induce defendant to enter said license agreement, plaintiff represented and warranted to defendant that the operating device commonly known as a 'tilter' used in

conjunction with the operation of the aforesaid venetian blind covered by the patents . . . . was a merchantable and workmanlike product and workable on all sorts of venetian blinds; that relying upon said representations and warranties aforesaid, defendant entered into said license agreement; that the mechanism in question sold to this defendant and attached to said venetian blinds did not function properly; that as a result thereof defendant was compelled to and did cease to manufacture said venetian blinds containing the apparatus, mechanism and tilter sold by plaintiff."

Defendant's counterclaim stated in substance the matters contained in its answer, and averred that as a result of the mechanical imperfections of the "tilter" it "had on hand inventory which was worthless and useless, that was purchased in anticipation of manufacturing venetian blinds in accordance with plaintiff's patents; that defendant was compelled to and did expend considerable sums of money in making refunds and adjustments with its customers in reinstallation of venetian blinds which were sold to and rejected by its customers." Plaintiff's reply to defendant's counterclaim denied that it made any misrepresentations or warranties and that it made any mechanisms commonly known as "tilters".

The decree ordered the dismissal of defendant's counterclaim for want of equity, and entered judgment in the sum of $3,861.37, with costs against the defendant. It further provided "that within 30 days thereof the defendant furnish plaintiff with true and correct statements of the sales of venetian blinds made by the defendant during each and every month commencing with January, 1940, through January 28, 1942", and referred the cause to a master in chancery "to ascertain, take, deliver and report to the court an account of the devices manufactured by the defendant between November 25, 1939 to January 28, 1942, and to hear evidence bearing on the

damages sustained by the plaintiff".

Although defendant urges five grounds for reversal, the principal questions presented and stressed in its brief are (1) whether defendant is liable for the minimum royalties under the license agreement, and (2) whether the decree of judgment for royalties and accounting is against the greater weight of the evidence. The main question on which the case hinges is the construction to be given to the license agreement, and particularly paragraphs 5, 15 and 16. Under the provisions of paragraph 5 no royalties shall be due for 1940. Commencing in the year 1941, however, the minimum royalties shall be based on business aggregating $100,000; and during the year 1942 and thereafter, the minimum royalties shall be based on business aggregating $200,000. Paragraph 5 further provides that in the event defendant fails to meet the minimum requirements, the plaintiff may convert the exclusive license into a nonexclusive license, or terminate the contract upon six months' notice in writing, if defendant fails to rectify such default within 90 days from the date of such notice.

Defendant urges that paragraph 15 makes a distinction between royalties earned on actual sales, and minimum royalties, and argues, in effect, that plaintiff's only remedy is forfeiture of the license contract if the defendant fails to pay the difference between actual royalties earned and the minimum amounts provided for in the agreement. Defendant insists that "a careful examination of the contract shows a clear intent on the part of the parties" that there be "no direct undertaking on the part of the defendant to pay any minimum royalties."

There can be no doubt that the parties expected the royalties to exceed the minimum provided for in the license agreement, since the last sentence in paragraph 5 gives plaintiff the option of terminating the license agreement in the event "the minimum net business

during 1942 or any succeeding year be less than one-half of the minimum therein specified." Manifestly paragraph 15 was incorporated in the agreement for the purpose of giving plaintiff minimum royalties for not less than one year.

In support of defendant's first contention, counsel cites Moon v. Roberts, 186 Ill. 15; Wing v. Ansonia Clock Co., 102 N. Y. 531; and Ebert v. Loewenstein, 42 App. Div. (N.Y.) 109. In Moon v. Roberts it appears that the question was whether the undertaking of Roberts was absolute to pay Moon $200 per month as royalties during the life of the patents or so long as the patentee, Moon, elected to continue the contract in force. Since the agreement in the Moon case does not contain a provision similar to paragraph 16, permitting the defendant (licensee) to cancel the agreement upon six months' notice in writing to plaintiff (licensor), and is dissimilar in other respects, we do not think it sustains defendant's position.

The cases of Wing v. Ansonia Clock Co., 102 N. Y. 531, and Ebert v. Loewenstein, 42 App. Div. (N.Y.)109 are reviewed and distinguished in the case of Cummings v. Standard Harrow Co., 105 N.Y. Supp. 646, affirmed 195 N. Y. 513. There the court said (p. 647):

"If the machine was not salable, the defendant made an unwise contract. If the failure to make the minimum number specified was due, not to the fault of the machine, but to the fault of the defendant, the plaintiff wisely provided against an inadequate return for the exclusive right to use his invention."

And again, at page 648, the court said:

"Such agreement cannot be regarded in any sense as providing a penalty. It was an agreement to pay at least that sum for the exclusive right granted it, and the mere fact that the contract is terminated upon its default is no answer to its obligation to pay the contract price for the right which it enjoyed."

In the case at bar, as in the Cummings case, plaintiff "provided against an inadequate return for the exclusive right to use his invention" until it was terminated under the provisions of paragraph 16. We think the chancellor's construction of the license agreement gives force and meaning to all of its provisions, and was, therefore, reasonable and proper.

The only other question urged by the defendant is that the chancellor erred in entering a judgment and referring the case to a master in chancery for an accounting. Defendant argues that the manifest weight of the evidence proves that "the patent is unmarketable", and "there was a breach by plaintiff of its express warranty that a commercial product could be produced and sold", and that therefore the judgment and order of reference should be set aside. The record in the instant case shows, however, that defendant did produce and sell a commercial product. Counsel for defendant relies on the case of Meissner v. Standard Railway Equipment Co., 109 S. W. 730. Although it is true that the court said (p. 732) that, where

> "The implements made, though they were skillfully made, under the direction and personal supervision of plaintiff himself, were unmarketable and incapable of use because they were defective in principle,"

those facts would constitute a good defense, the court continues on page 733,

> "If the defendant made and sold hammers that contained in their mechanism the alleged improvement covered by the plaintiff's patent, it would be no defense in a suit for the royalties to say that the improvement was impracticable and of no value. The fact that the defendant made and sold them under the license of the patentee would estop the defendant from saying that the improvement was of no value."

The language of the foregoing excerpt does not strengthen the defendant's position in the case at bar, since the defendant did make and sell venetian blinds which incorporated the patented features covered by the license agreement.

The only evidence in the record tending to prove oral warranties and misrepresentations, as alleged in defendant's answer and counterclaim, was that given by Max Albrecht, president of defendant corporation. On this issue, the chancellor found against the defendant. We believe that the scant evidence in the record justified the chancellor in finding that Nardulli did not make

the warranties and representations alleged by defendant. The evidence is uncontroverted that five or six weeks before signing of the license agreement, Nardulli furnished defendant with a working model of the licensed venetian blind, for study and examination. When we consider this circumstance, together with the defendant's long experience in the manufacture of venetian blinds, the magnitude of its business, which, according to defendant's testimony, "ran between $800,000 and $1,000,000 for the past two years," and its engineering facilities, it does seem to us highly improbable that defendant was influenced by any oral representations Nardulli might have made in reference to the patented features.

The rule has been repeatedly announced that the oral statements of an officer of plaintiff, made prior to or at the time of making a written contract, cannot add to the warranties contained therein. Stark v. Witmark & Sons, 189 Ill. App. 293; Werner v. Flosdorf, 317 Ill. App. 650. Applying this principle to the facts of the instant case, and in view of what we have already said, we are of the opinion that the decree of the Superior Court of Cook County is proper, and it is hereby affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

42848

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| SILVER CREEK COAL COMPANY, a corporation, Appellant, v. BULK SERVICE STATIONS, INC., a corporation, Appellee. | APPEAL FROM SUPERIOR COURT COOK COUNTY. |



MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order sustaining defendant's motion to strike its amended complaint for rent alleged to be due under the terms of a written lease.

On June 8, 1940, plaintiff filed its complaint at law. Defendant answered and plaintiff filed a reply which was stricken on defendant's motion. On November 19, 1942, plaintiff filed an amendment to its complaint, which was also stricken and leave was given defendant to file, not an amendment to, but an amended complaint. On January 21, 1943, plaintiff filed its amended complaint, to which defendant also filed a motion to strike. On March 17, 1943, the court sustained defendant's motion to strike the amended complaint, and plaintiff appealed.

The gist of the amended complaint, consisting of four counts was: Count 1, that Bulk Service Stations, Inc. entered into a written lease, using the name of Track Service Stations, Inc., a corporation; that it took possession of the premises and performed the terms of the lease by paying the rent provided therein, until November 1, 1938; that the lease was dated September 30, 1930 and expired October 31, 1940; that defendant did not pay rental accruing under the terms of the lease from November 1, 1938 to October 31, 1940; that Track Service Stations, Inc. never took possession of the premises leased and never paid any rent on the premises in question; that the lease was duly executed by the

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| SILVER CREEK COAL COMPANY, a corporation, Appellant, v. BULK SERVICE STATIONS, INC., a corporation, Appellee. | [illegible] |

[illegible]

[illegible]

motion to strike its complaint [illegible]

due under the terms of a [illegible]

On June 6, [illegible]

defendant answered and [illegible]

on demurrer [illegible]

amendment to its complaint, [illegible]

given defendant to file, but [illegible]

plaint. On January [illegible], 1948, [illegible]

to which defendant also filed [illegible]

the court sustained defendant's [illegible]

plaint, and plaintiff appealed.

The [illegible]

counterclaim: Count 1, [illegible]

a written lease, [illegible]

a corporation; that it took possession [illegible]

the terms of the lease by [illegible]

November 1, 1938; that the lease was [illegible]

expired October 31, 1940; that defendant [illegible]

accruing under the terms of the lease from November 1, 1938 to

October 31, 1940; that Bulk Service Stations, Inc. never took

possession of the premises leased and never paid any rent on the

premises in question; that the lease was duly executed by the

plaintiff and Track Service Stations, Inc. by their respective presidents and secretaries, and bore the corporate seal of the corporations: Count 2, that by the occupancy of the premises by defendant and the payment of the rental to plaintiff, a year to year tenancy was created; that said year to year tenancy was not terminated by defendant by the giving of a statutory notice: Count 3, that defendant by a verbal assignment of the lease agreed to pay plaintiff verbally the rental due under the terms of the lease, and that a privity of estate was created between plaintiff and defendant: Count 4, that defendant ratified in writing the verbal assignment of the lease by the adoption of a certain resolution and the writing of a letter, both of which were attached to the complaint. The resolution reads as follows:

"BE IT, AND IT IS HEREBY RESOLVED:

That the action heretofore taken by the former officers and directors of this corporation, in the leasing from Track Service Stations, Inc., to this corporation on or about the 30th day of September, 1930, under a certain lease from Silver Creek Coal Company to that corporation, dated the 30th day of September, 1930, and expiring the 31st day of October, 1940, covering premises and use of switch track at 1810 Lawrence Avenue, Chicago, Illinois, be and such action is hereby approved, confirmed and ratified for and on behalf of this corporation, and the officers of this corporation are hereby directed to make rentals payable to either Track Service Stations, Inc., or the original lessors, Silver Creek Coal Company, as they shall see fit."

The letter in question is on the stationery of the Bulk Service Stations, Inc. and is addressed to the plaintiff and signed by Track Service Stations, Inc., by Charles E. Gower; it refers to the extension of the lease for an additional five years after its termination.

plaintiff and Track Service Stations, Inc. by their respective presidents and secretaries, and bore the corporate seal of the corporations; Count 2, that by the occupancy of the premises by defendant and the payment of rent [illegible] to plaintiff, [illegible] year tenancy was created; that [illegible] year tenancy was not terminated by defendant by the giving of [illegible] notice; Count 3, that defendant by a verbal or [illegible] agreement to pay plaintiff verbally the rental [illegible] lease, and that a [illegible] and defendant; Count 4, that [illegible] verbal assignment of the lease by [illegible] resolution and the writing of a letter, both [illegible] to the complaint. The resolution reads [illegible]:

"RESOLVED, [illegible] :

That the action heretofore [illegible] and directors of this corporation, [illegible] Service Stations, Inc., to this corporation [illegible] day of September, 1929, under a certain [illegible] Coal Company to that corporation, [illegible] 1930, and expiring the 31st day of [illegible], [illegible] and use of action track as full [illegible], [illegible] be and such action is hereby approved, [illegible] and on behalf of this corporation, and [illegible] ation are hereby directed to make [illegible] Service Stations, Inc., or the original lessors, Silver Creek Coal Company, as they shall see fit."

The letter in question is on the stationery of the Sunk Service Stations, Inc. and is addressed to the plaintiff and signed by Track Service Stations, Inc., by Charles A. Gower; it refers to the extension of the lease for an additional five years after its termination.

Defendant's motion to strike alleged in substance that the lease purports on the face to be executed by Track Service Stations, Inc., by its president and secretary, respectively, with the seal of the corporation attached, and that the identity of the corporation is fixed and unambiguous; that nothing appears that any other person or corporation was intended to be bound or was in fact bound; that the alleged occupation of said premises and payments of rental by defendant do not constitute a year to year tenancy; that a valid lease was entered into between the plaintiff and Track Service Stations, Inc., which lease is not alleged to be assigned in writing as required by the statute of frauds.

Plaintiff contends that the amended complaint and each count thereof is sufficient in law and that plaintiff's cause of action is not barred by the statute of frauds. In support of plaintiff's position, counsel cites several cases, particularly stressing the case of McConnell v. The General Roofing Mfg. Co., 187 Ill. App. 99, where the court said (p. 105):

"It is a familiar rule, and one well sustained by authority, that where one person, for a valuable consideration, makes a promise to another for the benefit of a third person, such third person may maintain an action upon it."

At page 106 it appears that the appellant The General Roofing Mfg. Co., sublessee, executed a written contract which provided that it,

" ' shall be liable for and shall pay all proper and legitimate expenses and obligations arising * * * from the operation and maintenance of the James C. Woodley & Co. Branch, as aforesaid, including * * * rent.' Under this contract, appellant took possession of the premises described in the lease thus referred to, maintained its branch office and warehouse therein, and for over two years thereafter paid to the lessor the rent stipulated in the lease, all with the full knowledge and consent of such lessor."

In the instant case, the complaint did not allege that the plaintiff had any knowledge of or consented to the execution of the sublease by Track Service Stations, Inc. to the defendant, nor does it appear from the complaint that a similar written contract was executed obligating the defendant to pay the rent. Because of these dissimilarities we find nothing in the McConnell case supporting defendant's position.

Defendant's motion [illegible] that the lease executed on the [illegible] by [illegible] Stations, Inc., by its president [illegible], [illegible] the seal of the corporation [illegible] the corporation is fixed [illegible] that any other person or [illegible] was in fact bound; that the [illegible] and payments of rental [illegible] year terms; that a valid [illegible] tit and Track Service Stations, [illegible] to be as lessee in writing [illegible]

Plaintiff [illegible] count thereof is sufficient [illegible] action is not barred by [illegible] plaintiff's [illegible] citing 1.c. [illegible] 167 III. App. 8, [illegible]

"It is a familiar rule, and one [illegible] where one person, for a valuable [illegible] another for the benefit of a third person, [illegible] maintain an action upon it."

At page 106 it concerns [illegible] Mfg. Co., supra, [illegible]

" ' shall be liable for and shall [illegible] expenses and obligations [illegible] tenance of the lease [illegible] " " rent.' Under this contract [illegible] premises described in the lease [illegible] branch office and warehouse therein, and [illegible] after full be the lessor the rent stipulated [illegible] the full knowledge and consent of such lessor."

In the instant case, the complaint did not allege that the lessor had any knowledge of or consented to the execution of the contract by Track Service Stations, Inc. to the defendant, nor does it appear from the complaint that a similar written contract was executed obligating the defendant to pay the rent. Because of the dissimilarities we find nothing in the McDonnell case supporting defendant's position.

In Griffin v. Pfeffer Lumber Co., 285 Ill. 19, it appears that Griffin leased premises in the city of Olney to Barney & Hines, a partnership, for a term of ten years from March 1, 1907. Several months later Barney & Hines assigned the lease to Richland Lumber Co. who in turn assigned it to W. M. Simpson Lumber Co. The Simpson Lumber Co. assigned the lease to James G. McLean. At the time of the assignment of the lease to McLean, an addition was made to the lease, providing that in case of loss by fire, the loss would be payable to the lessor, Griffin. McLean organized a corporation which took over the business and, subsequently, the name of the latter was changed to Pfeffer Lumber Co. Pfeffer Lumber Co., appellee, had insured the buildings for its own benefit. The building on the premises was destroyed by fire and the appellee, Pfeffer Lumber Co., collected the insurance. Appellant, Griffin, filed suit on the original lease to recover the amount of insurance received by Pfeffer Lumber Co. and Pfeffer Lumber Co. pleaded the statute of frauds. At page 22, the court said:

"Appellants contend that the turning over of the premises by McLean, or the McLean Lumber Company, to appellee, and the latter taking possession and occupying them, constituted an assignment of the lease with all rights and liabilities incident thereto, and established privity of estate between the assignee of the leasehold and the lessors, and also that it became an executed and fully performed agreement under the facts shown, and that the Statute of Frauds cannot be invoked. There can be no doubt that the occupancy of the premises by appellee created such privity between it and appellants as to make appellee liable on a quantum meruit for the rent while it continued in possession, but it could not, in the absence of an agreement to that effect, be held to the performance of all the terms and conditions of the lease. We think this case must be controlled by the decision in Chicago Attachment Co. v. Davis Sewing Machine Co. 142 Ill. 171."

The facts in the Chicago Attachment case are similar to those of the instant case. The statute of frauds was interposed as a defense. The court said, at page 183:

"But here there is no deed or other writing, or memorandum or note of the contract to assign, executed by the lessees and delivered to and accepted by appellant, which can have the effect to divest the lessees and invest appellant with the title to the term; and since, as against the plea of the Statute of Frauds here interposed, the title to the term can not pass, pursuant to contract, unless that contract, or some memorandum or note thereof, shall be in writing and signed by the lessees, this parol contract of assignment is not executed."

Again, at page 184, the court said:

"In a court of law, part performance does not take a case out of the operation of the statute. It is otherwise in a court of equity, where the part performance has been to the extent here claimed."

In his reply brief, counsel for plaintiff states that "the case of Wackerle v. Nies, 359 Ill. 548, takes all the vitality out of the case of Chicago Attachment Company v. Davis Sewing Machine Company." A careful reading of the language in the Wackerle case, page 556, does not disclose any modification of the rulings in Chicago Attachment Company v. Davis Sewing Machine Company, 142 Ill. 171.

In his argument, counsel for plaintiff says:

"If the tenant takes possession, occupies and pays rent for a portion of the period, the contract is valid in equity."

maintaining that all distinctions between law and equity are abolished by the Civil Practice Act. In the recent case of Dunham v. Kauffman, 385 Ill. 79, at page 84, the court said:

"As to the questions under consideration we do not feel that the amendments to the Attachment Act or the adoption of the Civil Practice Act have eliminated the distinction between actions in equity and suits at law. In Frank v. Salomon, 376 Ill. 439, this court held that, although section 31 of the Civil Practice Act provides that there shall be no distinctions respecting the manner of pleading between actions at law and suits in equity, this section does not in any way affect the substantial averments of fact necessary to start any cause of action either at law or in equity; that the second paragraph of section 44, providing that any cause of action may be transferred at any time from the law docket to the equity docket, and vice versa, demonstrates that it was not the legislative intent to abolish substantive distinctions; that considering the provisions of the Civil Practice Act it was the obvious intention to do away with forms of pleading but to preserve separate procedure in law and in equity."

Plaintiff also contends that the resolution of defendant Bulk Service Stations, Inc., "duly ratified in writing the verbal assignment of the lease". Track Service Stations, Inc., the original lessee, and defendant were distinct legal entities. No fraud is charged in the complaint on the part of Track Service Stations, Inc. in

Again, at page 548, the court [illegible]:

"In a court of law, such [illegible] not [illegible] the operation of the statute. [illegible] equity, where the part [illegible] claimed."

In his reply brief, [illegible]

"The case of Lonergan v. Mills, [illegible] out of the case of Ohio [illegible] Monitor Company." [illegible] case, as a [illegible] does not [illegible] in Ohio [illegible]

III. IV.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

"As to the [illegible] Act [illegible] suits at [illegible] there shall be no [illegible] [illegible] any way affect [illegible] any case or [illegible] paragraph of section [illegible] transferred [illegible] any time [illegible] to [illegible] of the Civil Procedure Act [illegible] with force of [illegible] and in equity."

[illegible] defendant [illegible] Utilities, Inc., [illegible] of the lease." [illegible] and defendant were [illegible] in the comfort on the part of these service [illegible], Inc. in

obtaining the original lease from plaintiff, and it must therefore be assumed that it was entered into in good faith by both parties. The resolution merely approves the action of the former officers of defendant in securing a verbal sublease from Track Service Stations, Inc. Since the assignment was verbal, as alleged in the complaint, and therefore void under the statute of frauds, the resolution does not change its character. It still was a verbal assignment, and remains so. The lease being unambiguous as to who was intended to be bound by it, the terms cannot be varied or enlarged. Vail v. Northwestern Life Ins. Co., 192 Ill. 567; Jacobs v. Frank, 271 Ill. App. 264.

Finally, plaintiff urges that defendant was a tenant from year to year. The lease attached to the complaint is for a definite term and fixes the rental at a lump sum of $37,000 for the whole term, payable monthly. In Packard v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 46 Ill. App. 244, the court said, at page 245:

> "There was no holding over after the term expired, nor was there a reservation of the annual rent, which is said to be a leading circumstance which turns leases for an uncertain time into leases from year to year. 4 Kent 114; Herrell v. Sizeland, 81 Ill. 457."

Plaintiff's contentions are not tenable; therefore the order striking plaintiff's amended complaint is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

obtaining the original lease from plaintiff, and it must therefore be assumed that it was entered into in good faith by both parties. The resolution merely approves the act of the former officers of defendant in securing a verbal extension from Trust Service Station, Inc. Since the assignment was verbal, as alleged in the complaint, and therefore void under the statute of frauds, the resolution was not change its character. It still was a verbal assignment, and remains so. The lease being unenforceable as to who was intended to be bound by it, the terms cannot be varied or enforced. Hall v. Northwestern Life Ins. Co., 130 Ill. 587; Jacobs v. Irwin, 207 Ill. App. 166.

Finally, plaintiff urges that even if we should find from year to year, the lease extended in the complaint is for a definite term and fixes the rental, is a long run of 17, [illegible] terms, payable monthly. In Jackson v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 16 Ill. App. 84, the court said, [illegible]:

> "There was no holding over after the term expired, nor was there a conservation of the annual rent, which is said to be a leading circumstance which tends to [illegible] in unexpired lease into leases from year to year. Short Ill. Terrell v. Air Land, 81 Ill. 487."

Plaintiff's contentions are not tenable; therefore the order sustaining plaintiff's amended complaint is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J., AND BURKE, J., CONCUR.

42854

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| MARIE A. CARPENTER,<br>Appellee,<br>v.<br>METROPOLITAN TRUST COMPANY, LILLIAN E. CARPENTER and CARL E. HARRIS, Executors of the Last Will and Testament of Charles E. Carpenter, deceased,<br>Appellants. | APPEAL FROM<br>CIRCUIT COURT<br>COOK COUNTY. |



MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal, defendants seek to reverse an order of the Circuit Court allowing the claim of Marie A. Carpenter, hereinafter called plaintiff, based upon accrued alimony and a promissory note in the total sum of $17,535.03. An agreed statement of facts was filed by the parties, which reads as follows:

"Charles E. Carpenter, who was a practicing lawyer in Chicago, died June 18, 1942 and Metropolitan Trust Company, Lillian E. Carpenter and Carl E. Harris qualified as Executors of his Last Will and Testament. Marie A. Carpenter filed her claim against the estate on the 21st day of August, 1942 in the sum of $17,294.39. After hearing the Probate Court of Cook County, Illinois allowed the claim in the sum of $14,065, from which order both the Executors and the claimant appealed to the Circuit Court of Cook County, Illinois, where the separate appeals were consolidated. Upon hearing the Circuit Court allowed the claim in the sum of $17,535.03. The parties stipulate that the estate of Charles E. Carpenter has sufficient assets for the payment of the claim. At the trial plaintiff offered in evidence as plaintiff's Exhibit 1 promissory note dated February 4, 1930 in the sum of $3,000, bearing interest at 6% after February 4, 1930, the date of the note. It is agreed that the amount due on the note plus interest at the date of the order was $4,460.52. Claimant's Exhibit 2 was a certified copy of the Decree for divorce entered on the 2nd day of January, 1919 in the Superior Court of Cook County, Illinois, in Cause No. 339438, wherein Marie A. Carpenter and Charles E. Carpenter were divorced, the Decree providing for $15.00 a week to be paid to Marie A. Carpenter. It is agreed between the parties that claimant's Exhibit 1, the promissory note, was given in payment of the amount that was then due (February 4, 1930) and that payments thereafter made by Charles E. Carpenter to Marie A. Carpenter were noted on the note. The last of said payments so noted was dated June 12, 1942. It is further agreed that the record in the office of the Clerk of the Superior Court shows no entry made in the Carpenter divorce proceeding after January 2, 1919."

Defendants contend that plaintiff's failure to enforce the provisions of the divorce decree for a period of 12 years preceding the death of Charles E. Carpenter constituted laches.

After the filing of this appeal, the precise question involved here was determined in Wadler v. Wadler, 325 Ill. App. 83, and in Felton v. Felton, 326 Ill. App. 444. In the Felton case, at page 448, referring to the Wadler case, the court said:

"The authorities cited by defendant, and many others, involving the question of alimony where the defense of laches was interposed, are therein reviewed and distinguished. The court held, in effect, that a divorce decree providing for the payment of alimony was, by its nature, a continuing order, and said, at page 93:

"'If it be assumed that a decree for alimony is a money decree, as indicated by the foregoing decisions, it is difficult to perceive why the 20-year statute of limitations applicable to judgments, as provided in par. 24b, sec. 25, ch. 83, Ill. Rev. Stat. 1943 [Jones Ill. Stats. Ann. 107.284(2) ], does not apply, and since plaintiff filed her petition for a money judgment long before any of the payments could have been barred by the 20-year limitation, the amount awarded her was manifestly proper'."

Whether the last payment made by Charles E. Carpenter, deceased, on June 12, 1942 was intended by the deceased to be applied as alimony on the divorce decree, as urged by plaintiff, or as interest which accrued on the note, as argued by defendant, we think is immaterial, since the decree for alimony is a money decree and a continuing order. Nor do we consider the death of Charles E. Carpenter a circumstance which affects the applicability of the rulings in the Wadler and Felton cases, for the reason that plaintiff filed her claim long before it was barred by the twenty-year statute of limitations.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

42910

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| JOSEPH BREITMEIER, Appellant, v. SAM P. SUTERA, Appellee. | APPEAL FROM SUPERIOR COURT COOK COUNTY. |



MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries, and, upon trial by a jury, defendant was found not guilty. Plaintiff's motion for a new trial was overruled and judgment entered on the verdict. Plaintiff appeals.

While walking from the west curb of Ashland Avenue in the City of Chicago to a safety island for the purpose of boarding a southbound street car on Ashland Avenue, the plaintiff was struck by defendant's automobile. The safety island was four feet wide and approximately sixty feet long, located immediately west of the west rail of the southbound street car tracks and north of the north crosswalk of Byron Street. The plaintiff testified that he was 58 years of age and for many years has been employed as a carpenter in a factory located near the scene of the accident; that he left his place of employment on September 26, 1941 about 5 o'clock p.m. and walked to the intersection of Ashland Avenue and Byron Street to board a southbound street car, arriving at the intersection about 5:10 or 5:15 p.m.; that he stood at the west curb of Ashland Avenue about 25 feet north of Byron Street waiting to board the street car and, while standing there for a few moments, he observed four or five people on the safety island, two or three of whom he knew; that automobiles were parked along the west curb of Ashland Avenue, the nearest one being about 100 feet north of the point where he was standing; looking to the north, just before he left the west curb

[illegible]

JOSEPH SHULTHEIS,

Appellant,

v.

SAM P. SUTERA,

Appellee.

[illegible]

MR. JUSTICE [illegible]

Plaintiff brought [illegible]

injuries, and, upon trial by jury, [illegible]

Plaintiff's motion for a new trial was overruled, [illegible]

entered on the verdict. Plaintiff prosecutes

While walking from [illegible] on

the City of Chicago to [illegible]

a southbound street car on Halsted Street, [illegible]

by defendant's automobile. The [illegible]

and approximately sixty feet [illegible]

east curb of the southbound street car [illegible]

north crosswalk of Lyons Street. The [illegible]

was 55 years of age and for many years had been [illegible]

carpenter in a factory located [illegible]

he left his place of employment [illegible] at

p.m. and walked to the intersection of Halsted Street [illegible] look

street to board an southbound street car, arriving [illegible] at

about 6:10 or 6:15 p.m.; that he stood [illegible] on

curve about 20 feet north of Lyons Street waiting [illegible] and

car and, while standing there for a few moments, he observed four

or five people on the safety island, two of them [illegible]

that automobiles were parked along the west curb of Halsted Avenue;

the nearest one being about 100 feet north of the [illegible] at

standing; looking to the north, just before he left the west curb

of Ashland Avenue, he saw a southbound street car approaching "sixty or seventy feet away" and "an automobile" 150 or 160 feet away; and that as he was about to "step on the safety island with his left foot" he was struck by defendant's automobile; and that from the time he left the curb he did not look north again.

Mary Fiore and Herbert Musker were called to testify in behalf of the plaintiff and gave substantially the same version of the accident as plaintiff's.

Defendant Sam Sutera was called by plaintiff under Section 60 of the Civil Practice Act and testified, substantially, that there were two or three automobiles parked along the west curb of Ashland Avenue directly west of the safety island, and that plaintiff ran from between the parked automobiles in a southeasterly direction toward the north end of the safety island, and as he emerged into the lane of traffic he collided with the right side of defendant's automobile.

Eugene Hottinger, a motorman employed by the Chicago Surface Lines, was called in behalf of the defendant and testified that the accident happened in a manner substantially as described by the defendant. Although plaintiff urges four grounds for reversal, the principal grounds presented and stressed in his oral argument were, first, that the court erred in giving instruction number 10 and, second, the conduct of counsel and the rulings of the court. The instruction in question reads as follows:

"The Court instructs the jury that at the time of the alleged occurrence there was in full force and effect a statute of the State of Illinois, Section 172 of Chapter 95½ of the Illinois Revised Statutes, which was as follows:

"'Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.'

"If you believe from the evidence that the plaintiff violated the above statute and that such violation was the proximate cause of the injury to the plaintiff, if any, then the plaintiff cannot recover."

of Ashland Avenue, he saw a southbound street car approaching [illegible] or seventy feet away" and "an automobile 150 or 160 feet away; and that he was about to [illegible] Ashland [illegible] foot" he was struck by defendant's automobile; [illegible] time he left the car he had not [illegible].

Mary Kline and Jerome [illegible] testified in behalf of the plaintiff [illegible] the accident as follows:

[illegible] 60 of the civil practice act [illegible] more than two or three [illegible] avenue directly west of the street [illegible] from between the [illegible] toward the north [illegible] the lane of traffic [illegible] automobile.

[illegible] line, was called in behalf of [illegible] accident happened in a manner [illegible] defendant. Although [illegible] principal grounds presented and stressed in [illegible] first, that the court erred in giving [illegible] second, the conduct of counsel and [illegible] instruction in question reads as follows:

"The Court instructs the jury that at the time of the occurrence there was in full force and effect in the state of Illinois, Section 1V2 of Chapter 95½ of the Illinois Revised Statutes, which was as follows:

"'Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.'

"If you believe from the evidence that the plaintiff violated the above statute and that such violation was the proximate cause of the injury to the plaintiff, if any, then the plaintiff cannot recover."

This instruction is objectionable because it does not correctly state the law with respect to the rights of a pedestrian on the public highway or the duties of a vehicle operator. (Moran v. Gatz, 390 Ill. 478.) It also omits subsection (d) of Section 172, of Chapter 95½. In Tuttle v. Checker Taxi Co., 274 Ill. App. 525, a similar instruction was criticized, and at page 530 the court said:

"The instruction directed a verdict and errors it contains are not cured by other instructions. The trial court properly ordered a new trial."

Plaintiff also urges that the court erred in permitting defendant's counsel to cross-examine plaintiff's witness Musker with reference to the circumstances under which he left his former employment. Musker testified that he was employed as a janitor by the Board of Education of the City of Chicago and had been a bartender, and that among his former employers was one King. Appearing on pages 36 and 37 of the Abstract is the following:

"Q. Tell me, what were the circumstances under which you left Mr. King's employment?
MR. KARLIN: I object to that, if the Court please.
THE COURT: What is the materiality?
MR. JACOBS: I think it may be material if we learn it.
MR. KARLIN: What has Mr. King got to do with this case?
MR. JACOBS: I don't think Mr. King has anything to do with it, but I think this gentleman has told an entirely different story from what occurred and I think —
MR. KARLIN: I object to that and ask the Court to tell counsel not to bring extraneous matters in.
THE COURT: Let him answer and we will strike that out if it is not material.
MR. KARLIN: I object—
THE WITNESS: I resigned.
MR. JACOBS: What happened to the merchandise in Mr. King's place the night that you resigned?
MR. KARLIN: I object to that, if the Court please.
THE COURT: Yes. Strike it out.
MR. JACOBS: That is all."

This instruction [illegible] objectionable because it [illegible] correctly states the law [illegible] to the right [illegible] on the public highway or the [illegible] a [illegible] (Lemon v. State, 320 Ill. 479, [illegible] 1926, of Thayer and [illegible] In Martin v. Thompson [illegible] 1926, a similar instruction was criticized, [illegible] said:

"The instruction [illegible] vehicle [illegible] owned by other [illegible] a new trial."

Plaintiff also [illegible] counsel to cross-examine [illegible] to the circumstances [illegible] Under [illegible] Revocation of the [illegible] that [illegible] 21 and 27 of the [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

We think that any inference the jury might draw from these questions would tend to reflect on the character of the witness. Although the court properly ordered it stricken, the frailties of the human mind make it extremely difficult for jurors to disregard the prejudicial effect, which lingers in their minds long after the court's ruling, and often leads them astray. (City of Chicago v. Uhter, 212 Ill. 174; The People v. Anderson, 337 Ill. 310; Foster v. Shepherd, 258 Ill. 164; Randall Dairy Co. v. Pevely Dairy Co., 274 Ill. App. 474.) In the view which we take of this case it is unnecessary to consider the other points raised, since it was prejudicial error to give instruction number 10.

Judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED
FOR A NEW TRIAL.

KILEY, P.J. AND BURKE, J. CONCUR.

We think that any inference the jury might draw from these questions would tend to reflect on the character of the witness. Although the court properly ordered it stricken, the fallibility of the human mind make it extremely difficult for jurors to disregard the prejudicial effect, which lingers in their minds long after the courtroom ruling, and often leads them astray. (Cf. [illegible] v. Ulster, 215 Ill. 174; The People v. [illegible], 327 Ill. [illegible]; [illegible] v. Shepherd, 288 Ill. 164; [illegible] v. [illegible], 174 Ill. App. 474.) In the view which [illegible] it is unnecessary to consider the other [illegible], which [illegible] prejudicial error to give instruction [illegible].

Judgment is reversed and the cause is remanded for a new trial.

[illegible]

KILEY, P.J., [illegible], J., concur.

42962

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| TRUST COMPANY OF CHICAGO, Administrator of Estate of Elizabeth Palmer Smith, deceased, and JASON PAIGE, as Executor of Estate of Carrie E. Paige, deceased, et al., Appellants, v. CITY OF CHICAGO, et al., Appellees. | APPEAL FROM CIRCUIT COURT COOK COUNTY. |



MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal, plaintiffs seek to reverse an order sustaining defendants' motion to dismiss plaintiffs' complaint in chancery under the provisions of Section 48 of the Civil Practice Act. Plaintiffs appealed to the Supreme Court of Illinois where, upon oral argument, the cause was transferred to this court. Subsequently, plaintiffs sought a review by petition for certiorari before the Supreme Court of the United States, which was denied.

The essential facts are uncontroverted. On June 2, 1926, a judgment was entered against the City of Chicago in favor of Elizabeth Palmer Smith for $41,600, in a condemnation proceeding in the County Court of Cook County, case number 48421, entitled, "In the Matter of a Petition of the City of Chicago for confirmation of the Commissioner's Report and Assessment Roll for Widening of East and West 22nd Street from Michigan Avenue to Archer Avenue, in the City of Chicago - - City of Chicago vs. Chicago, Rock Island & Pacific Railroad, et al."

On September 16, 1927, a warrant was issued by the Board of Local Improvements of the City of Chicago, approving payment of the said sum of $41,600, as compensation for the amount awarded Elizabeth Palmer Smith. After describing the premises condemned,

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| TRUST COMPANY OF CHICAGO, Trustee of Estate of Elizabeth Palmer Smith, deceased, and JESSE HALL, Trustee of Estate of Carrie E. Ruge, deceased, et al., | |
| Appellants, | |
| v. | |
| CITY OF CHICAGO, et al., | |
| Appellees. | |

Mr. JUSTICE [illegible] delivered the opinion of the court:

By this appeal, plaintiff [illegible] seeks a review of a decree sustaining defendants' motion to [illegible] in chancery under the provisions of [illegible] Civil Practice Act. Plaintiffs appealed to the [illegible] Illinois where, upon oral argument, the [illegible] this court. Subsequently, plaintiffs [illegible] for certiorari before the [illegible] which was denied.

The essential facts are uncontroverted. [illegible] a judgment was entered against the [illegible] Elizabeth Palmer Smith for $41,000, in a condemnation [illegible] in the County Court of Cook County, case number [illegible] "In the Matter of a Petition of the City of [illegible] of the Commissioner's report and assessment roll [illegible] East and West 22nd Street from Michigan Avenue to [illegible] Avenue, in the City of Chicago -- City of Chicago vs. [illegible] & Pacific Railroad, et al."

On September 16, 1927, a warrant was issued by the [illegible] of Local Improvements of the City of Chicago, authorizing payment of the said sum of $41,000, as compensation for the amount awarded Elizabeth Palmer Smith. After describing the premises condemned,

the warrant reads as follows: "being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings." On September 23, 1927, a check for $41,600 was issued to Elizabeth Palmer Smith who thereafter, on October 6, 1927, collected the money through an agent, one Rosenstone, who was duly authorized in writing to accept it.

More than six years after receipt of the money, on October 23, 1933, Elizabeth Palmer Smith instituted mandamus proceedings against the City of Chicago, Edward J. Kelly, Mayor, Board of Local Improvements of the City of Chicago, William W. Link, President, R. B. Upham, Comptroller of the City of Chicago, and James F. Kearns, Treasurer of the City of Chicago, to collect the balance alleged to be due her on the judgment obtained in the condemnation proceeding in the County Court of Cook County, case number 48421. The petition alleged in effect that the payment of $41,600 made by the City of Chicago should have been first applied to the payment of interest which accrued on the judgment from the date of entry to the date of payment, thus leaving a balance due on the principal.

Defendants filed an answer, which was subsequently withdrawn on leave of court. On May 20, 1940, the defendant City of Chicago filed a motion to dismiss under Section 48 of the Civil Practice Act, supported by affidavits, stating as grounds therefor that the alleged cause of action set forth in the petition did not accrue to plaintiffs within the time limited by law for the commencement of said action; and that the cause of action is based upon the failure of the City of Chicago to pay interest alleged to be due on the judgment entered in the County Court on June 2, 1926 and which was paid on October 27, 1927. Plaintiffs filed a counter-affidavit in which no issues of fact were raised.

the warrant reads as follows: "being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings." On September 22, 1927, a check for $41,800 was issued to Elizabeth Palmer Smith who thereafter, on October 6, 1927, collected the money through an agent, one Rosenstone, who was duly authorized in writing to accept it.

More than six years after receipt of the money, on October 22, 1932, Elizabeth Palmer Smith instituted mandamus proceedings against the City of Chicago, Edward J. Kelly, Mayor, Board of Local Improvements of the City of Chicago, William A. Link, President, E. P. Upham, Comptroller of the City of Chicago, and James E. Kearns, Treasurer of the City of Chicago, to collect the balance alleged to be due her on the judgment obtained in the condemnation proceeding in the County Court of Cook County, case number 48421. The petition alleged in effect that the payment of $41,800 made by the City of Chicago should have been first applied to the payment of interest which accrued on the judgment from the date of entry to the date of payment, thus leaving a balance due on the principal.

Defendants filed an answer, which was subsequently withdrawn on leave of court. On May 20, 1940, the defendant City of Chicago filed a motion to dismiss under section 40 of the Civil Practice Act, supported by affidavits, stating as grounds therefor that the alleged cause of action set forth in the petition did not accrue to plaintiffs within the time limited by law for the commencement of said action; and that the cause of action is based upon the failure of the City of Chicago to pay interest alleged to be due on the judgment entered in the County Court on June 2, 1926 and which was paid on October 27, 1927. Plaintiffs filed a counter-affidavit in which no issues of fact were raised.

On November 12, 1941, an order was entered suggesting the death of Elizabeth Palmer Smith and substituting as plaintiff the Trust Company of Chicago as administrator of her estate. On January 12, 1942, the court entered an order sustaining the defendants' motion to dismiss and striking the petition for a writ of mandamus and also granting plaintiffs leave to file a separate complaint in chancery and to join additional parties as plaintiffs. On January 20, 1942, the plaintiffs filed a complaint in chancery consisting of 41 pages, in the nature of a class suit in equity to administer a trust, concluding with a lengthy prayer for an accounting, solicitors' fees and injunctive relief. The facts upon which the petition for a writ of mandamus and the chancery suit were founded were the same except that an additional party plaintiff is named in the chancery count.

On February 13, 1942, defendants made a written motion to dismiss the complaint in chancery under Section 48 of the Civil Practice Act, alleging in substance that the complaint fails to allege facts (1) showing plaintiffs' right to file a representative suit, (2) showing that the defendants are trustees, and (3) that the alleged causes of action set forth in the complaint did not accrue to plaintiffs within the time limited by law. On April 21, 1942, the court sustained the defendants' motion to strike and dismissed the chancery count at plaintiffs' costs. Plaintiffs appealed from this order.

Plaintiffs' principal contention is that the suit is based upon a trust in writing established pursuant to and under the protection of the constitution of Illinois. Plaintiffs' theory is that "condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner, and that all the usual principles of equity and of chancery procedure which govern in ordinary sales of real estate apply; that the judgment order is a signing of that contract, and that prior

On November 12, 1941, an order was entered suspending the death of Elizabeth Palmer with an appointing as administrator the Trust Company of Chicago as administrator of her estate. On June 9, 1942, the court entered an order sustaining the defendants' motion to dismiss and striking the petition for a writ of mandamus and also granting plaintiffs leave to file a [illegible] in chancery and to join additional [illegible]. On January 20, 1942, the plaintiffs filed a complaint [illegible] at issue, in the nature of a bill in [illegible] trust, concluding with a lengthy prayer [illegible] fees and injunctive relief. The [illegible] a suit of mandamus and the [illegible] except that an additional party [illegible].

On February 1, 1942, [illegible] dismiss the complaint in chancery and [illegible] motions set, filed in [illegible] allege facts (1) showing [illegible] suit, (2) showing that the relationship [illegible] alleged cause of action [illegible] plaintiffs within the time limited by law. On April 7, 1942, the court sustained the defendants' motion to dismiss and dismissed the chancery count at plaintiffs' costs. [illegible]

Plaintiffs' principal contention is that their suit is based upon a trust in writing established pursuant to and under the provisions of the constitution of Illinois. Plaintiffs' theory is that "condemnation proceedings provide a means of making a conveyance upon the court record for the purchase of real estate from an unwilling owner, and that all the usual principles of equity and of chancery procedure which govern in ordinary sales of real estate apply; that the judgment order is a signing of that contract, and that prior

proceedings and the constitutional provisions are the terms of the contract; that the condemnor (City of Chicago) as purchaser of real estate is trustee of the purchase price from the date of such judgment until payment in full with interest has been made to the property owner." Under plaintiffs' theory a trust relationship existed between the parties, and the City of Chicago was therefore precluded from interposing the bar of the five-year statute of limitations, thus permitting the plaintiffs first to apply the payment of $41,600 to the interest which accrued on the judgment and, second, to the balance then remaining unpaid on the judgment. Defendants contend that the facts present "the exceedingly simple case of a suit brought for interest upon a judgment more than five years after the principal has been paid in full."

In support of their position, defendants cite the case of Cohen v. City of Chicago, 377 Ill. 221, and the recent case of Chapralis v. City of Chicago, 326 Ill. App. 554, transferred from the Supreme Court to this court, both of which involve the question of the payment of interest on a condemnation judgment under circumstances similar to those in the case at bar. In the Chapralis case the court sustained a motion to dismiss under Section 48 of the Civil Practice Act and cites the Cohen case with approval. Plaintiffs, in attempting to distinguish the Chapralis case from the instant case, urge in their supplemental citations and suggestions, page 28, filed with this court on October 24, 1945, that (1) the matter of trusteeship by the City of Chicago for the plaintiffs as cestuis que trustent was not presented nor argued, that the decision turned only upon the point of practice under Section 48 of the Civil Practice Act involving the filing of counteraffidavits; (2) that the matter of constitutional lien was not discussed; and (3) that it was a suit at law which did not seek or require any disclosure by the defendants as fiduciaries in equity.

proceedings and the constitutional provisions are the terms of the contract; that the condemnor (City of Chicago) as purchaser of real estate is trustee of the purchase price from the date of such judgment until payment in full with interest has been made to the property owner." Under plaintiffs' theory a trust relationship existed between the parties, and the City of Chicago was therefore precluded from interposing the bar of the five-year statute of limitations, thus permitting the plaintiffs first to sue for the payment of $41,000 to the interest which accrued on the judgment sum, second, to the balance then remaining unpaid on the judgment. The trial court found that the facts present "the exceedingly rare case of a suit brought for interest upon a judgment more than five years after the principal has been paid in full."

In support of their position, defendants cite the decisions in Cohen v. City of Chicago, 397 Ill. 241, and the recent decision in Chapralis v. City of Chicago, 329 Ill. App. 324, transferred from the Supreme Court to this court, both of which involve the question of the payment of interest on a condemnation judgment under circumstances similar to those in the case at bar. In the Chapralis case the court sustained a motion to dismiss under section 45 of the Civil Practice Act and cites the Cohen case with approval. Plaintiffs, in attempting to distinguish the Chapralis case from the instant case, urge in their supplemental citations and suggestions, page 28, filed with this court on October 24, 1946, that (1) the matter of transferring by the City of Chicago for the plaintiffs as certain use trustees was not presented nor argued, that the decision turned only upon the point of practice under Section 45 of the Civil Practice Act involving the filing of counteraffidavits; (2) that the matter of constitutional lien was not discussed; and (3) that it was a suit at law which did not seek or require any disclosure by the defendants as fiduciaries in equity.

We have examined the briefs filed in the Supreme Court in the Chapralis case and find that the constitutional guaranty of just compensation under Section 13 of Article II of the Illinois constitution was argued at page 10 in appellant Chapralis' petition for rehearing of the order of transfer from the Supreme Court to the Appellate Court. In the instant case, although plaintiffs did file a counteraffidavit in the mandamus proceeding and make reference to it in the chancery count, they failed to controvert the facts contained in defendants' motion to dismiss and, therefore, the facts contained in the defendants' motion must be taken as true. (People v. United States F. & G. Co., 306 Ill. App. 518, 523.) Plaintiffs also insist, at page 6 of the supplemental citations and suggestions, that, "The effect of the order of transfer is that those decisions so cited in the briefs for plaintiff are sufficient direction to enable this court to make due application of the constitution to the pleading and record of this case. While this Appellate Court does not decide debatable constitutional questions it has the duty under the order of transfer, and must apply to the record of this case now before the court the constitutional law of Illinois as it has been announced and settled by the Supreme Court." We do not think that the plaintiffs' position is tenable, since the constitutional questions now urged by plaintiffs were argued in the instant case and the Chapralis case before the Supreme Court, and we therefore conclude that the order of transfer from the Supreme Court to this court is tantamount to a ruling that no constitutional questions were involved. The language in the case of Cohen v. City of Chicago, 377 Ill. at page 227, clearly shows that the Supreme Court did consider the same constitutional points now being urged by plaintiffs in the present case.

We have examined the briefs filed in the Supreme Court in the Chmerlis case and find that the constitutional guaranty of just compensation under Section 15 of Article II of the Illinois constitution was argued at page 17 in appellant's Supreme Court petition for rehearing of the order of transfer from the Supreme Court to the Appellate Court. In the instant case, plaintiffs contend that file a counterpetition with in the Supreme Court and also argued to it in the chmerlis case. They failed to convince the court contained in defendants' motion to dismiss, therefore, the facts contained in the defendants' motion must be taken as true. (People v. United States L. Co., 308 Ill. App. 18, 22.) Plaintiffs also insist, at page 9 of their brief, that the suggestions, that "the [illegible] decisions so cited in the briefs [illegible] direction to enable this court to make [illegible] attitude to the pleading and record of [illegible]. The Appellate Court has not decided [illegible] has the duty under the [illegible], and must apply to the record of this case now before the court the [illegible] of Illinois as it has been announced and applied by the Supreme Court." We do not think that the plaintiffs' contention is tenable, since the constitutional questions now argued by plaintiffs were argued in the instant case and the Chmerlis case before the Supreme Court, and we therefore conclude that the order of transfer from the Supreme Court to this court is tantamount to a ruling that no constitutional questions were involved. The language in the case of Cohen v. City of Chicago, 277 Ill. at page 227, clearly shows that the Supreme Court did consider the same constitutional points now being urged by plaintiffs in the present case.

We think plaintiffs' claims are for interest only, and are barred by the five-year statute of limitations. (Blakeslee's Warehouses v. City of Chicago, 369 Ill. 480), and that plaintiffs' theory of a trust as set forth in their briefs is without merit.

For the reasons indicated, the order of April 21, 1942, sustaining defendants' motion to dismiss and dismissing the chancery count at plaintiffs' costs, is affirmed.

AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

42972

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| JOHN A. McCUE, Appellee, | ) | APPEAL FROM |
| v. | ) | MUNICIPAL COURT |
| J. P. FLYNN, JR., and MRS. J. P. FLYNN, JR., Appellant. | ) | OF CHICAGO. |



MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant James P. Flynn, Jr., seeks to reverse a judgment for $192.30 entered in favor of plaintiff, an employee of defendant, for wages. The cause was heard by the court without a jury. Defendant Mrs. J. P. Flynn, Jr., wife of J. P. Flynn, Jr., was never served with summons.

For many years defendants operated several bowling and recreational establishments in Chicago. They employed plaintiff in May, 1939, for one year, to manage one of their establishments at an annual salary of $3,000. At the end of the year plaintiff tendered a written resignation and, after some negotiations, he was reemployed at an annual salary of $5,000.

Plaintiff testified that he entered into an oral agreement with defendants to act as general manager of all their establishments for a term of three years and was to receive two weeks vacation each year with pay. During the latter part of April, 1943, plaintiff informed defendant that he was going to take a two-weeks' vacation commencing May 1, this being the last two weeks of his term of employment under the contract; that he was granted a vacation in June of 1940 and also in 1941 after the close of the bowling season; and that in 1942 he was ill for six weeks and away from his employment, during which period he received his salary.

Defendant testified that he did not agree to employ plaintiff for a period of three years and grant annual vacations with pay; that "none of our employees or managers are granted vacation,

JOHN A. McCUE,

Appellee,

v.

J. P. FLYNN, JR., and Mrs. J. P. FLYNN, JR.,

Appellant.

MR. JUSTICE [illegible]

By this appeal the [illegible]

to reverse a judgment for [illegible]

an employee of defendant, [illegible]

court without a jury. [illegible]

J. P. Flynn, Jr., was not a [illegible]

For many years [illegible]

representional establishment [illegible]

in May, 1936, for one year, [illegible]

at an annual salary of $3,000. [illegible]

tendered a written resignation [illegible]

was reemployed at an annual [illegible]

Plaintiff testified [illegible]

with defendant, to act as general manager [illegible]

for a term of three years [illegible]

each year with May. During the latter [illegible]

informed defendant that he was going to [illegible]

commencing May 1, this being the last [illegible]

employment under the contract; that he was [illegible]

June of 1940 and also in 1941 after the close of the wrestling season;

and that in 1942 he was ill for six weeks [illegible] from his employ-

ment, during which period he received his salary.

Defendant testified that he did not agree to employ plain-

tiff for a period of three years and grant annual vacations with

pay; that "none of our employees or managers are granted vacation,

except in emergencies, prior to June 1, which is the close of the bowling season"; that when he learned plaintiff was arbitrarily starting his vacation on May 1, he told plaintiff that "nobody is taking a vacation on my money", to which plaintiff replied, "I am through". After plaintiff returned from his vacation, he demanded two weeks' salary. On July 1, 1943, two weeks after his contract with defendants had terminated, plaintiff opened a bowling establishment known as Milford Recreation, which he continues to operate. Plaintiff has not filed an appearance or brief.

The only question presented for determination is whether the finding against defendant is contrary to the law and the evidence. The testimony of plaintiff and defendant is in direct conflict. The record does not disclose any corroborating circumstances favoring either party. Neither was impeached, and they stood before the court equal in character.

The affirmative statement by one witness met by a flat categorical denial by another of equal credibility does not meet the elementary requirement of the law that a plaintiff must make out his case by a preponderance of the evidence. (Brady v. Chaffee, 163 Ill. App. 242, 245; Northern Trust Co. v. Parker, 205 Ill. App. 450; Sullivan v. Andrews, 205 Ill. App. 590.)

Since the plaintiff has failed to prove his case by a preponderance of the evidence, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

KILEY, P.J. AND BURKE, J. CONCUR.

except in emergencies, prior to June 1, which is the close of the bowling season"; that when he learned plaintiff was contemplating starting his vacation on May 1, he told plaintiff that "nobody is taking a vacation on my money", to which plaintiff replied, "I am through". After plaintiff returned from his vacation, he received two weeks' salary. On July 1, 1953, the week after his contract with defendants had terminated, plaintiff commenced a action, particulars known as Milford Horseshoe, which [illegible] plaintiff has not filed an answer to [illegible].

The only question [illegible] the finding against defendant is [illegible] evidence. The testimony of plaintiff [illegible] conflict. The second [illegible] attorneys favoring either party. Whether [illegible] before the court sound is [illegible].

The affirmative [illegible] by a categorical denial by another or equal or [illegible] the elementary requirement of the law that [illegible] his case by a preponderance of the evidence. [illegible] v. [illegible], 102 III. App. 644, 648; Northern Trust Co. v. [illegible], 90 III. 450; Sullivan v. [illegible], 308 III. App. 300.

Since the plaintiff has failed to prove his case by a preponderance of the evidence, the judgment of the trial court and the cause is reversed.

Reversed.

KILEY, P.J. and BURKE, J., concur.

43103



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| JOSEPH KASZAB, Inc., a corporation, Appellee, v. T. K. GIBSON, et al., Defendants, On Appeal of A. W. WILLIAMS, One of Defendants, Appellant. | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order of the Municipal Court of Chicago denying a motion in writing in the nature of a proceeding for a writ of error coram nobis to vacate a judgment in the sum of $150 entered against defendant.

Plaintiff filed a statement of claim on October 2, 1941, alleging that Truman K. Gibson, Jr. executed a written contract for the rental of show cases for and on behalf of American Negro Exposition, and that the American Negro Exposition was a voluntary combination of twenty individuals, the defendant being among those named.

The facts are substantially uncontroverted. On the day the suit was filed, a writ of summons was issued by the clerk of the court, directed to the bailiff, naming all the defendants. The following notation appeared on the back of the summons:

> "Serve Truman K. Gibson, Jr., A. W. Williams, Dr. M. O. Bousfield,"

with their respective addresses in the City of Chicago.

The return of the bailiff shows that the defendant A. W. Williams, alone, was served on October 6, 1941. Thereafter, on October 15, 1941, an order of default was entered against him, and on June 29, 1943, a default judgment was entered against defendant Williams doing business as "Diamond Jubilee Exposition Authority"

and "American Negro Exposition", in the sum of $150 and costs. A motion to quash the service of summons was made on September 29, 1943 and denied on October 4, 1943. Two executions were issued against defendant, one on July 17, 1943, and the other on October 15, 1943, both of which were returned nulla bona.

A petition to support the motion was filed by the defendant on November 4, 1943, alleging in substance the following: that defendant was only one of twenty individuals ever served with summons, although all were "prominently widely known citizens", that the Diamond Jubilee Exposition Authority is an Illinois corporation, and that none of the defendants named in the statement of claim "have ever combined, agreed or volunteered together to do business as American Negro Exposition"; that the plaintiff knew defendants were not acting individually; that five of defendants were directors of the Diamond Jubilee Authority, and the remaining fifteen were members of Afra-American Emancipation Exposition; and that if these facts were known to the court it would not have entered judgment against defendant.

Plaintiff filed a motion to dismiss the petition, supported by an affidavit which recited the service of summons, order of default, entry of judgment against defendant, and the denial of the motion to quash the service of summons. Defendant filed a counteraffidavit repeating in substance the matters contained in his petition.

The theory of the defendant is that a joint contract was pleaded by the plaintiff and that the failure to serve with summons seventeen out of the twenty defendants named in the statement of claim nullifies the judgment; and that the defendant could not be "doing business as a lawfully constituted corporation".

The plaintiff's theory is that the contract sued on was joint and several, that a judgment against defendant alone was

and "American Logs Association", in the sum of [illegible] and motion to quash the service of summons [illegible] 1943 and ended on December [illegible], 1944. The [illegible] against defendant, one on June 17, [illegible] and the [illegible] 13, 1945, both of which [illegible]

A petition to account [illegible] on November [illegible], 1945, [illegible] defendant [illegible] only on [illegible] although all [illegible] Diamond [illegible] and that none of the [illegible] "have ever [illegible] and American Logs Association" [illegible] were not joint [illegible] at the [illegible] members of [illegible] facts were [illegible] against [illegible]

[illegible] by an affirmative [illegible] default, entry of [illegible] the motion to quash [illegible] constructively [illegible] his position.

The theory of the [illegible] pleaded by the plaintiff [illegible] sevenths out of the [illegible] claim nullifies the judgment; and that the judgment could not be "doing business as a factually constituted corporation".

The plaintiff's theory is that the contract sued on was joint and several, that a judgment against defendant "one was

proper, and that there was no ground for writ of error coram nobis. Many of the defendants named are not residents of the City of Chicago. Attempts to serve summons on some of the others were unsuccessful. Although defendant was served with summons in this cause on October 6, 1941, nothing in the record seems to disclose the reason for his delay of almost two years in making a motion to quash the bailiff's return of service. Since the defendant's motion to quash the return of service was heard and denied by the trial court on October 4, 1943, and the point was not raised in appellant's brief we must assume that the service was proper. In Cramer v. Commercial Men's Assn., 260 Ill. 516, 521, the court said:

"The writ of error coram nobis at common law would lie to correct purely ministerial errors of the officers of the court . . . . the motion is not intended to relieve a party from the consequences of his own negligence."

The filing of a petition for a writ of error coram nobis is the commencement of a new suit at law in which new issues are made up. (Harris v. Chicago House Wrecking Co., 314 Ill. 500, 504). Error coram nobis does not lie to contradict and put in issue any fact that has been adjudicated in the action or to correct any error of judgment of the court. (Chapman v. North American Ins. Co., 292 Ill. 179, 188.)

The court having acquired jurisdiction of the defendant, this brings us to the consideration of defendant's principal contention, whether the service of only one defendant is error of fact which, if known to the court, would have prevented it from entering a judgment. In support of his position, defendant stresses the case of O'Donnell v. Turnes, 201 Ill. App. 481. In that case it appears from the statement of claim that the liability was joint, and, though the action was brought against three defendants, the summons was issued against only one. In construing Section 14 of the former Practice Act, Rev. St. ch. 110 (J. & A. Par. 8551), the court said, at page 482:

"This provision of the statute, however, contemplates that a summons must first issue against all of the joint defendants before proceeding to judgment against any." (Citing Sherburne v. Hyde, 185 Ill. 580.)

In the Sherburne case, at page 584, the court said:

"It does not follow that because the plaintiff cannot elect to sue one, only, of several partners who are jointly liable, but must sue all, that judgment may not be rendered, as this section provides, against one, or more than one, who are served, and the prescribed steps then taken to bring in and make the remaining members of the firm parties to the judgment. A plaintiff cannot, in any case, bring his action against more than one and less than all of his joint debtors, but under this statute he may sue all, whether partners of not, and take judgment against so many as are served or who appear, and the rest may be made parties to the judgment by summons in the nature of scire facias. But whether they are so made parties to the judgment or not, the judgment is valid because the statute authorizes it. So it is seen that the power of the court to render judgment against one or more joint debtors where all are sued, and thus to produce a severance if it becomes necessary, does not depend on the right of the plaintiff to elect to produce such severance himself, by bringing his suit against a part, only. * * * 'At the common law, where several defendants were sued upon a joint contract, the plaintiff was not entitled to judgment against any of them until all were served with process or until those not served were prosecuted to outlawry. * * * But to remedy the inconveniences of the common law practice,' the statute 'has provided that a return of non est inventus as to a part of the defendants shall authorize the plaintiff to proceed to trial and judgment against those upon whom service has been had, and authorizes the issuing of a summons in the nature of a scire facias, to make the defendants not served parties to the judgment.' (Evans v. Gill, 25 Ill. 100; Davidson v. Bond, 12 id. 84.)"

It should be noted that the case of O'Donnell v. Turnes was brought up for review by writ of error, and Sherburne v. Hyde by appeal. These cases hold that a judgment entered as in the present case is valid, but they did not involve the writ of error coram nobis. In effect, defendant in the instant case is seeking a review of the judgment not by appeal, but by a proceeding in the nature of a writ of error coram nobis. The error in fact which may be assigned must be some fact unknown to the court which, if known, would have precluded the rendition of the judgment. (Cramer v. Commercial Men's Ass'n., 260 Ill. 516, at page 522.) The entry of judgment in the instant case does not constitute an error of fact justifying the setting aside of the judgment, for the fact that there were nineteen other defendants was made known to the court by the pleadings, and therefore was not such an unknown fact

as would warrant the granting of the writ.

Defendant contends that the court erred in entering the judgment, since Diamond Jubilee Exposition Authority is a corporation, and that "American Negro Exposition was a trade name like Ivory Soap". All the defendants' names, including Williams' appear on the letterhead on which the contract in question was written (Abst. p. 21). The first sentence of the contract reads as follows: "We wish to confirm our arrangements on rental of show cases for the American Negro Exposition, sports division". Though members of this group apparently used several other names, one of which was that of a corporation, the contract in the case at bar was executed in the name of American Negro Exposition. This is the contract sued on and upon which the judgment was based. There was no showing of any fraud on the part of the plaintiff or of excusable mistake on the part of the defendant preventing defendant from making his defense.

The rule has long been established that the writ of error coram nobis will not lie unless the omission to interpose a valid defense is due to fraud, duress, or excusable mistake, and without negligence on the part of the defendant. The motion is not available to review questions of fact which arise upon pleadings or to correct errors of the court upon questions of law. (Jacobson v. Ashkinaze, 337 Ill. 141, 146; Jerome v. Quincy Street Building Corporation, 385 Ill. 524.)

For the reasons indicated, the order denying defendant's motion is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

43119



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| EDWIN M. HADLEY, JR., Plaintiff - Appellee, v. ERNEST E. LILLIANDER, et al., Defendants On Appeal of WILLIAM H. MURPHY and HENRY F. HAGEMEYER, Defendants - Appellants. | APPEAL FROM SUPERIOR COURT COOK COUNTY. |

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff, Edwin M. Hadley, filed his complaint in chancery in which he prayed that three stock certificates issued by Atlantic Casting and Engineering Corporation, a corporation (hereinafter called Atlantic), in the names of the plaintiff, defendant William H. Murphy and defendant Henry F. Hagemeyer for 839 shares each, together with certain stock powers held by the defendant Ernest E. Lilliander as escrowee, be delivered to the plaintiff; and that judgment be entered against the defendants Murphy and Hagemeyer in favor of plaintiff for the amount of dividends received by them and converted to their own use. After defendants joined issue, the cause was heard by the chancellor who entered a decree.

The decree directed the clerk of the Superior Court, with whom all of the stock certificates had been impounded, to deliver one of the certificates to the plaintiff upon the entry of the decree, and one to each of the defendants upon the payment to plaintiff by the defendants of the amount provided in the decree and, in the event of their failure to make such payment, that plaintiff be declared absolute owner of all the certificates. Defendants Murphy and Hagemeyer appealed. After proofs were closed, defendant Lilliander was dismissed from the case.

The gist of the complaint was that Atlantic, a New Jersey corporation, issued certificate P-1 in the name of plaintiff and certificates P-2 and P-3 in the names of defendants Murphy and Hagemeyer, respectively, for 839 shares each, for which plaintiff paid Atlantic the sum of $45,000 with his own funds; that on October 14, 1941 an escrow agreement was executed between plaintiff and defendants, the pertinent provisions of which are as follows: That all the stock of the corporation be deposited with the defendant Lilliander as escrowee and sold if any purchaser offered not less than $150,000; that in the event the stock was sold, plaintiff was to receive $45,000 and interest at 5 per cent per annum from October 1, 1941, also the interest which accrued before October 1, 1941 amounting to $7,620, $5,726 for personal expenses, and $15 per day from October 1, 1941 to the date of payment; that the remainder of the proceeds was to be equally divided between plaintiff, Hadley, and the defendants Hagemeyer and Murphy. The agreement terminated March 1, 1942. Subsequently, a second agreement was executed by the same parties, containing the same language, and extending the termination date to October 1, 1942.

The complaint further alleged: that defendants Murphy and Lilliander were partners in the law firm of Murphy, Lilliander and Gemmill and acting as attorneys for plaintiff in all matters concerning the escrow agreements and the deposit of the stock certificates with the defendant Lilliander; that they falsely told plaintiff it was necessary to execute the escrow agreement to facilitate the sale of the stock certificates; that the escrow agreement and certain stock powers were deposited with defendant Lilliander for the improper purpose of obtaining control over and possession of the stock certificates; that defendants Murphy and Hagemeyer converted certain dividends to their own use; and prayed that the court may find that malice is the gist of the action.

The gist of the complaint was that Atlantic, a New Jersey corporation, issued certificate F-1 in the name of plaintiff and certificates F-2 and F-4 in the names of defendants Murphy and Hagemeyer, respectively, for 500 shares each, for which plaintiff paid Atlantic the sum of $45,000 with his own funds; that on October 14, 1941 an escrow agreement was executed between plaintiff and defendants, the pertinent provisions of which are as follows: That all the stock of the corporation be delivered to the defendant Lilliendor as escrowee and held in escrow [illegible] not less than $150,000; that in the event the [illegible] plaintiff was to receive $45,000 and interest [illegible] from October 1, 1941, also the interest which accrued before October 1, 1941 amounting to $7,880, [illegible] per day from October 1, 1941 to the date [illegible]; that the remainder of the proceeds was to be [illegible] and the defendants [illegible]. [illegible] March 1, 1942. [illegible] same parties, [illegible] extension date to October 1, 1942.

The complaint further alleges that [illegible] Murphy and Lilliendor were partners in the [illegible], Lilliendor and Gammill and acting as attorneys for plaintiff in all matters concerning the escrow agreements and the transfer of the stock certificates with the defendant Lilliendor; that they falsely told [illegible] it was necessary to execute the escrow agreement to facilitate the sale of the stock certificates; that the escrow agreement and certain stock powers were deposited with defendant Lilliendor for the improper purpose of obtaining control over and possession of the stock certificates; that defendants Murphy and Hagemeyer converted certain dividends to their own use; and prayed that the court may find that malice is the gist of the action.

Defendant Murphy filed his answer denying in substance that plaintiff had any right to return of the stock certificates and that he converted the dividends to his own use; that he was acting as attorney for the plaintiff and made any false representations with respect to the necessity for executing the escrow agreement in question; and that the escrow agreement and certain stock powers were deposited with defendant Lilliander for any improper purpose. Defendant Hagemeyer filed an answer containing substantially the same averments. Defendants filed counterclaims alleging themselves to be the owners of stock certificates numbered P-2 and P-3, respectively, and prayed that the court declare the escrow agreement terminated and order the stock certificates P-2 and P-3 with stock powers attached to be delivered to them as rightful owners.

The decree found, inter alia, that plaintiff, and defendants Murphy and Hagemeyer, learned Atlantic needed additional financing, as well as assistance in certain of its operating problems; that plaintiff agreed to purchase 2517 shares of its preferred stock with his funds and had it issued in equal amounts to plaintiff and defendants Murphy and Hagemeyer; that defendant Murphy was to render legal services; that defendant Hagemeyer was to devote his talents to the improvement of certain mechanical processes used by Atlantic; that the business of Atlantic, after the purchase of the stock, improved rapidly; that subsequently the stock was placed in escrow, as evidenced by escrow agreements dated October 14, 1941 and January 5, 1942; that when the stock was sold under the terms of the escrow agreement each of the defendants was to pay to plaintiff one-third of the purchase price of $45,000 and the sums specified in paragraphs 1 to 5 inclusive; that in the event of a loss to plaintiff the defendants Murphy and Hagemeyer were to share one-third each; that it was the intention of defendants that plaintiff should have a lien on the stock as security for the sums due him from

Defendant Murphy filed his answer denying in substance that plaintiff had any right to return of the stock certificates and that he converted the dividends to his own use; that he was acting as attorney for the plaintiff and made any false representations with respect to the necessity for executing the escrow agreement in question; and that the escrow agreement and certain stock powers were deposited with defendant Hildebrandt for any improper purpose. Defendant Hagemeyer filed an answer containing substantially the same averments. Defendants filed counterclaims alleging themselves to be the owners of stock certificates numbered F-2 and F-7, respectively, and prayed that the court declare the escrow agreement terminated and order the stock certificates F-2 and F-7 with stock powers attached to be delivered to them as rightful owners.

The decree found, later filed, that plaintiff, and not defendants Murphy and Hagemeyer, learned atlantic needed additional financing, as well as assistance in certain of its operating problems; that plaintiff agreed to purchase 88% shares of its predecessor stock with his funds and had it issued in equal amounts to plaintiff and defendants Murphy and Hagemeyer; that defendant Murphy was to render legal services; that defendant Hagemeyer was to devote his talents to the improvement of certain mechanical processes used by Atlantic; that the business of Atlantic, after the purchase of the stock, improved rapidly; that subsequently the stock was placed in escrow, as evidenced by escrow agreements dated October 14, 1941 and January 5, 1942; that when the stock was sold under the terms of the escrow agreement each of the defendants was to pay to plaintiff one-third of the purchase price of $45,000 and the sums specified in paragraphs 1 to 5 inclusive; that in the event of a loss to plaintiff the defendants Murphy and Hagemeyer were to share one-third each; that it was the intention of defendants that plaintiff should have a lien on the stock as security for the sums due him from

defendants under the provisions of the escrow agreement; that before the termination date of the escrow agreement October 1, 1942 Atlantic prospered, and plaintiff determined not to sell the stock for the sum of $150,000 as provided in the escrow agreement, and placed a value upon the stock of $300,000 to $350,000; that the plaintiff and defendants Murphy and Hagemeyer agreed orally that the escrow agreement be indefinitely extended until a purchaser, at a price satisfactory to all, could be found; that the oral agreement was communicated to defendant Lilliander, escrowee, and was in full force and effect on October 1, 1942; that there was no impropriety in the issuance of the stock certificates or in the subsequent receipt by defendants Murphy and Hagemeyer of the dividends declared upon the stock issued by Atlantic in the names of the defendants; that plaintiff never requested defendants to return dividends on said stock; that prior to the filing of the instant suit plaintiff never represented to defendants that he was the owner of the stock certificates issued in their names; that the escrow agreements were not prepared for the improper purpose of obtaining control over and possession of the stock certificates; that defendants dealt in entire good faith with the plaintiff and are entitled to the dividends while the stock remains in their respective names; and that the prayer that malice is the gist of the action is not supported by the evidence.

The decree ordered that Murphy and Hagemeyer each pay to the plaintiff one-half of the total amount set forth in the decree, being $42,447.33, with interest on two items of said total from October 1, 1941, within ninety days from the date of the decree, unless an appeal is taken, and if an appeal is taken, then within ninety days after the decree becomes final; that the clerk of the Court deliver to the plaintiff on the entry of the decree one of said certificates of stock in question, being the one standing in

defendants under the provisions of the escrow agreement; that before the termination date of the escrow agreement October 1, 1942 litigation proceeded, and plaintiff determined not to sell the stock for the sum of $150,000 as provided in the escrow agreement, and placed a value upon the stock of $[illegible] to $[illegible]; that the [illegible] and defendants hereby and thereafter [illegible] that the escrow agreement be indefinitely extended until [illegible] satisfactory to all, could be found; that [illegible] communicated to defendant [illegible] force and effect on October 1, 1942; that [illegible] in the issuance of the stock certificates [illegible] recognized by defendants hereby and thereafter [illegible] upon the stock issued by [illegible]; that plaintiff never requested [illegible] made above; that prior to the filing of the [illegible] never force called to defendants [illegible] certificates issued in their [illegible]; that the [illegible] were not presented for the [illegible] and possession of the other certificates; [illegible] entire good faith with the [illegible] while the stock remains in their possession; and that [illegible] prayer that malice in the plaintiff [illegible] the evidence.

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the name of the plaintiff, No. P-1 for 839 shares, then impounded with the clerk, and that upon the payment by each of the defendants of the amount provided in the decree the clerk shall deliver to each of said defendants the stock certificate standing in the name of such defendant and now impounded with the clerk of the Court; that if either of the defendants fails to pay to the plaintiff the sum due from him at the time stated the stock certificate standing in the name of such defendant failing to pay shall be delivered to the plaintiff, who in that event is declared to be the absolute owner of said stock certificate; and that the Court retain jurisdiction of the cause until the decree has been completely carried out in all respects and that each party be charged with his own costs, and that no costs of any party herein be taxed to any other party.

Defendants urge the following grounds for reversal: (1) that the court changed the contract of the parties in disregard of law and required defendants Murphy and Hagemeyer to pay plaintiffs for the shares of stock standing in their respective names, otherwise to lose the ownership of said stock; (2) the improper finding in the decree that plaintiff is entitled to possession of certificate P-1 for 839 shares; (3) the failure of the court to allow defendant to file an amended counterclaim; and (4) refusal of the court to allow the witness William B. Gemmill to testify.

Counsel for plaintiff, in their reply brief (p.7) state that, "the findings and the decree are abundantly justified by the record. The defendants were accorded more than fair treatment." In defendants' brief (p. 17) counsel say that "the decree in this case creates an anomalous situation by finding every important issue of fact for the defendants, but nevertheless gives the plaintiff

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Counsel for plaintiff, in their reply brief (p.7) state that, "the findings and the decree are abundantly justified by the record. The defendants were accorded more than fair treatment." In defendants' brief (p. 17) counsel say that "the decree in this case creates an anomalous situation by finding every important issue of fact for the defendants, but nevertheless gives the plaintiff

every material advantage." Since neither party has challenged the findings of fact made by the chancellor and incorporated in the decree, there is no need of reviewing the testimony of the witnesses contained in the voluminous record consisting of more than two thousand pages. The rule has been repeatedly announced that when a court of equity acquires jurisdiction for one purpose it acquires jurisdiction for all purposes and will do full and complete justice between all parties and determine all their rights. (Wehrheim v. Smith, 226 Ill. 346-352; County of Cook v. Davis, 143 Ill. 151-155; Longshore v. Longshore, 200 Ill. 470-476.) The chancellor found that plaintiff and defendants agreed that the escrow agreement should be, "extended indefinitely until a purchaser at a price satisfactory to all could be found", and that Hadley should have a lien on said stock for the security of the payments to be made therefore by defendants.

The evidence clearly shows that the plaintiff was induced to purchase the controlling interest in the corporation by defendants Hagemeyer's and Murphy's promise to plaintiff that they would, "stick with the business and see it through if plaintiff furnished the money". It appears that plaintiff was wholly unfamiliar with the corporation's business or its manufacturing technique. By utilizing Hagemeyer's technical skill and Murphy's legal talent, it was rescued from its precarious condition. As the profits of the corporation's business increased plaintiff's valuation of the stock also increased. In view of the corporation's improved condition at the time the escrow agreement was about to terminate, he insisted that the stock be sold for 300 or 350 thousand dollars. Defendants did "stick with the business" as they promised while it was in desperate straits, believing that the stock which represented the

every material advantage." Since neither party has challenged the findings of fact made by the chancellor and incorporated in th decree, there is no need of restating the testimony of the witnesses contained in the voluminous record containing of more than two thousand pages. The rule has been repeatedly announced that when a court of equity possesses jurisdiction for one purpose it retains jurisdiction for all purposes and will do full and complete justice between all parties and determine all their rights. (Gaskins v. Smith, 236 Ill. 445-456; County of Cook v. Hill, 40 Ill. 112; Longmore v. Longmore, 250 Ill. 378-382.) The evidence shows that plaintiff and defendants agreed that the [illegible] and be, "extended indefinitely until a compromise [illegible] to all could be found", and that [illegible] annual [illegible] stock for the security of the [illegible] by defendants.

The evidence clearly shows that the [illegible] to purchase the controlling interest in the corporation [illegible] Hagemeyer's and Murphy's promise to plaintiff that [illegible] "stick with the business and see it through if plaintiff furnished the money". It appears that plaintiff was really induced [illegible] the corporation's business or its manufacturing [illegible]. By utilizing Hagemeyer's technical skill and Murphy's [illegible], it was rescued from its precarious condition. As the profits of the corporation's business increased, plaintiff's [illegible] of the stock also increased. In view of the corporation's improved condition at the time the escrow agreement was about to terminate, he insisted that the stock be sold for 300 or 350 thousand dollars. Defendants did "stick with the business" as they promised while it was in desperate straits, believing that the stock which represented the

controlling interest would eventually be sold at a price in excess of the plaintiff's lien, thus yielding all the parties a handsome profit. We think they should be afforded an opportunity to reap the fruits of their efforts by selling the stock in a block.

Under the terms of the decree, defendants merely have the privilege of becoming minority stockholders by paying for the stock in cash, which plaintiff agreed they need not do in the first instance. We think a ~~xxxxxxxxxx~~ provision should be added directing that all the stock be sold in a block, within a period which the chancellor deems reasonable under all the surrounding and attendant circumstances. In the event the offers for the purchase of all the stock received within the time to be fixed by the chancellor for the sale thereof are insufficient to satisfy plaintiff's lien, or are unsatisfactory to the defendants or either of them, then defendants shall pay the sums due plaintiff, and, upon their failure to do so, plaintiff be declared the absolute owner of the stock as provided in the decree.

Defendants also contend that the chancellor erred in refusing to allow defendants to file an amended counterclaim which alleged in substance that the plaintiff had improperly acquired certain stock which was purchased and paid for by the wife and mother-in-law of plaintiff, neither of whom were made parties defendant. The evidence is undisputed that the stock standing in their names was paid for by them. We think the chancellor properly refused permission to file an amended counterclaim.

The only remaining contention is that the chancellor erred in refusing to allow the witness William B. Gemmill to testify to facts showing conspiracy between the plaintiff and his

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The only remaining contention is that the chancellor erred in refusing to allow the witness William B. Gammill to testify to facts showing conspiracy between the plaintiff and his

father to blacken the character and injure the reputations of the defendants. We think this is without merit since the offer of proof did not tend to show a conspiracy.

The chancellor's findings in the decree are justified by the evidence, but we think the further provision hereinbefore suggested should be added permitting the sale of all the stock in a block as urged by the defendants.

The decree is therefore reversed and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, P.J. AND BURKE, J. CONCUR.

rather to blacken the character and injure the reputations of the defendants. We think this is without merit since the offer of proof did not tend to show a conspiracy.

The chancellor's findings in the decree are justified by the evidence, but we think the further provision hereinbefore suggested should be added permitting the sale of all the stock in a block as urged by the defendants.

The decree is therefore reversed and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, P.J. AND SWEET, J. CONCUR.

43082

MACK BERNAT,
Plaintiff,

v.

H. LAWRENCE HENDRICKSON, as Trustee under the 4602 N. Monticello Liquidation Trust, known as Trust No. 7670, EDWIN L. READ, CHARLES WADSWORTH, EMIL N. LEVIN, FAYE LISS and "UNKNOWN OWNERS,"
Defendants-Appellees,

On Appeal of BARBARA KAMM, Intervening Petitioner,
Defendant-Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In this cause counsel for intervening petitioner has utterly failed to comply with rule 7 of the Rules of Practice of the Appellate Court in that he makes no statement of the case and renders it impossible to understand from a reading of the brief the facts involved in the litigation upon which his argument is predicated. Consequently we have had to rely upon the statement of the case as presented by counsel for H. Lawrence Hendrikson, the trustee, which appears to be fairly accurate and correct, as well as our own examination of the record.

Suit was filed by Mack Bernat for the liquidation of an express trust. His complaint asked that the trustee be enjoined from selling the assets of the trust, that he be removed from office, and that the assets of the trust be sold under the supervision of the court. The gravamen of the complaint was that the trustee was guilty of wrong-doing. It appears that in 1939 a trust was created for the benefit of the former bond-holders of an apartment building situated at 4602 Monticello avenue, in Chicago. Certificates of Beneficial Interest in the

trust were issued to some 50 beneficiaries. The agreement provided that the trust should continue for a period of not more than 15 years, and its object was the sale and liquidation of the trust property as soon as possible, and in the interim the conservation of the trust estate and the disposition of the income among the beneficiaries. The trustee and trust manager were given broad powers with respect to the operation and management of the property, but the trust agreement contained an express limitation on the power to sell. It provided in effect that no sale could be made without first giving 20 days' written notice to the beneficiaries of any proposed sale, and that no sale should be made if 35 per cent or more of the beneficiaries objected.

After the creation of the trust the trustee operated the property and made periodic reports to the beneficiaries. In the spring of 1943 he received several offers for the sale of the property, and on April 2nd of that year received an appraisal thereof from the Chicago Real Estate Board in the amount of $50,000. September 10, 1943 he entered into a contract with Faye Liss for the sale of the property for $54,500. The agreement contained the following provision: "it is expressly agreed that the sale by Seller of the above described real estate, as contemplated by this agreement, is subject to the approval of the holders of shares of beneficial interest, represented by certificates of beneficial interest outstanding of record in the 4602 NORTH MONTICELLO AVENUE LIQUIDATION TRUST, identified as Trust No. 7670, hereinbefore referred to. Within twenty (20) days after the date of this agreement, Seller, in accordance with the terms of the Trust Agreement creating said Trust No. 7670, and in the manner therein provided, shall mail to the holders of such certificates of beneficial interest

trust were [illegible] to [illegible] years. [illegible] provided that the trust should continue [illegible] period of not more than [illegible] years, [illegible] the [illegible] liquidation of the trust [illegible], and in the interim the conservation [illegible] the [illegible] tion of the trust [illegible] and trust [illegible] operation and management of the [illegible] trust contained in [illegible] provided in effect [illegible] stating [illegible] proposed [illegible] or more of the [illegible] objects.

After the execution [illegible] the property [illegible] in the [illegible] of the property [illegible] approximately the [illegible] amount of [illegible] trust with [illegible] The agreement contained the following [illegible] expressly agreed that [illegible] real estate, or contracted [illegible] the approval of the [illegible] represented by such [illegible] of beneficial interest outstanding of record in the [illegible] NORTH [illegible] identified as Trust No. 7670, heretofore referred to. Within twenty (20) days after the date of this agreement, Trustee, in accordance with the terms of the Trust Agreement creating said Trust No. 7670, and in the manner therein provided, shall mail the to the holders of such certificates of beneficial interest

notice of the sale contemplated herein, and it is agreed that if, within twenty (20) days from the date of mailing of such notice, the holder or holders of thirty-five per cent (35%) or more of the shares of beneficial interest represented by certificates of beneficial interest then outstanding of record shall lodge with Seller written objection to the sale contemplated herein, Seller shall thereupon have the right to declare this agreement null and void and thereupon Seller shall cause deposit made by Buyer to be returned without any deductions or charges. Buyer agrees that if, at any time within twenty (20) days after the date of mailing of notice of the sale contemplated herein to the holders of the certificates of beneficial interest, a higher offer is submitted to the Seller for said property, the Seller at his option shall have the right to cancel this agreement."

Ten days later the trustee sent a letter to all certificate holders advising them of the terms of the offer and stating that, "Although this letter specifically describes the offer made by Faye Liss, it shall constitute a notice to you of any equal or better offer which the Trust Managers or Trustee may receive in the meantime. If you do not object to this offer within the time and in the manner provided by the Trust Agreement, it shall be assumed that you approve any other equal or better offer."

No higher offer was received within the 20-day objection period, and holders of only 3 per cent of the units of Beneficial Interest objected to the sale. On September 22nd Mack Bernat filed his complaint to restrain the sale. Thereafter, on December 10, 1943, Barbara Kamm, who appeals, filed her petition for leave to intervene, alleging that she was a beneficiary of the trust and that she had been informed that the trustee was

planning to sell the property far below its cash market value, and that the petitioner was under the impression that sale could not be made unless all certificate holders consented thereto.

The cause was then set for trial, the court heard evidence, proofs were closed and oral arguments of counsel for all parties were heard. No evidence was offered by Barbara Kamm to sustain the allegations of her intervening petition that she was a beneficiary of the trust. The record disclosed that the trustee acted honestly and diligently in the administration of his trust. In the course of the trial the attorney for Barbara Kamm presented to the court an exhibit, being a written offer to purchase the property for $58,000. The offer was dated December 13, 1943 and was first brought to the attention of the trustee at the hearing on December 14, 1943. At the conclusion of the hearing the court found and orally stated that plaintiff had not sustained the allegations of his complaint and had wholly failed in his proof, and accordingly dismissed the bill for want of equity. After the court had made its finding and indicated the complaint would be dismissed, Barbara Kamm, as intervening petitioner, by her attorney made a verbal motion for leave to file a cross-complaint, but the proposed counterclaim was not exhibited to the court nor was the court advised of its contents, and the motion was therefore denied.

Two points are urged as ground for reversal. It is first contended that the court erred in refusing to allow the intervening petitioner to file a counterclaim, and she relies on provisions of the Practice Act (Ill. Rev. Stat. 1943, ch. 110, sec. 38) and two decisions, Chicago Title & Trust Co. v. Herlin, 299 Ill. App. 429, and Boddiker v. McPartlin, 379 Ill.

567, in support of her contention. The latter case is not at all in point and in fact it does not touch upon the proposition advanced. The Herlin case merely holds that a defendant who desires to obtain affirmative relief against a codefendant is required to file a counterclaim and cannot secure relief on an answer.

Under the Practice Act a counterclaim may be filed by defendant with his answer; but if it is to be filed later it must be with the court's permission, and the court is vested with discretion in determining whether or not it shall be filed. Aaron v. Dausch, 313 Ill. App. 524. In this proceeding the counterclaim was never presented to the court, nor were the contents thereof made known. In fact the motion for leave to file a counterclaim was not presented until after proofs had been closed, the case argued orally and the court had indicated what its decision would be. There had been a full trial, and the court was clearly within its discretion in refusing to allow the filing of the counterclaim at that stage of the proceeding.

The other ground urged for reversal is that the court had authority to direct that the property be sold to the highest and best bidder for cash irrespective of dismissal of plaintiff's bill for want of equity. The nature of the counterclaim does not appear in the record, and after the court had denied the motion for leave to file it, there was nothing in the record to show the nature of the pleading or ground for the allegation. Consequently the point has not been preserved for determination. Lewis v. McCreedy, 378 Ill. 264.

The appellee argues two other points, one dealing with the diligence and good faith of the trustee and the other with the sufficiency of the evidence to support the

567). In support of her contention, the latter case is not at all in point, and in fact it does not cover upon the proposition advanced. The [illegible] defendant to do less to obtain [illegible] a codefendant in [illegible] to file a [illegible] and cannot secure relief on an answer.

Under the [illegible] defendants with his answer [illegible] filed by it must be [illegible] vested with [illegible] it shall be filed. [illegible] In this proceeding [illegible] assessed to the court, nor was the [illegible] the motion for leave to [illegible] until after record had been [illegible] and the court had [illegible] be, there has been a full trial, and [illegible] discretion in [illegible] claim at that stage of the [illegible].

The other [illegible] had authority to [illegible] the court highest and best bidder [illegible] of plaintiff's bill for want of [illegible] of the counterclaim does not appear in the record, and after the court had denied the motion for leave to file it, there was nothing in the record to show the nature of the plea or ground for the allegation. Consequently the claim has not been preserved for determination. McKee v. Horton, 378 Ill. 264.

The appellee argues two other points, one dealing with the diligence and good faith of the trustee and the other with the sufficiency of the evidence to support the

finding and decree, neither of which appears in appellant's points and authorities, and therefore we consider it unnecessary to pass upon them.

For the reasons indicated we are of opinion that the decree should be affirmed, and it is so ordered.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

43122

CLARK R. EBERT,
Appellee,

v.

AUSTIN C. ARMSTRONG,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

322 I.A. 332

MR. PRESIDING JUSTICE FRIEND delivered the opinion of the court:

The defendant, Austin C. Armstrong, appeals from a final decree of the Superior court, entered pursuant to a master's hearing and report, permanently enjoining him from obstructing the right-of-way and driveway over the rear end of his lot in Glencoe, Illinois, and from interfering with or molesting plaintiff, Clark R. Ebert, his agents or representatives while driving his truck and automobiles over the driveway.

It appears from the pleadings and evidence adduced before the master that in 1906 defendant became the owner of two 50-foot lots on the northeast corner of Park and Grove avenues in Glencoe, Illinois, which fronted on Park avenue, the corner lot being No. 449 and the lot immediately to the east being No. 445 Park avenue. In 1926 he commenced the operation of a roofing business from his home at 449 Park avenue, using the garage then on the rear of that property as his place of business. Later he turned the garage partway around and moved it to the east side of the other lot at 445 Park avenue, and at the same time made an entrance from the side which increased the capacity of the garage from two to four cars, and drove to and from this garage across the driveway, extending across the rear of the corner lot at 449 Park avenue.

In 1928 defendant gave the property at 445 Park avenue to his son and daughter-in-law but continued, as before, to use the garage at the rear of that property in the operation of his business. During 1936 and 1937 he built a two-car garage on the property at 445 Park avenue and attached it to the south end of the other garage building so that the two structures became one, housing six cars. The additional garage was intended for the use of his son George.

In the summer of 1937 defendant approached plaintiff, who had formerly worked for him in the roofing business for about three years and who was then employed at Heinecke's Hardware Store in Glencoe, and offered to sell him the roofing business. The parties had known each other for many years, and in addition to having been business associates, were good friends and on the best of terms. Plaintiff advised defendant that he would think over the proposition, and when defendant again approached him about a week later plaintiff indicated that he was interested in purchasing the business. Shortly thereafter a third conversation was had between the parties near Bartoli's store in Glencoe. There is a conflict in the evidence as to whether they were alone or whether Theodore Kramer and Arthur Kirchner were present, plaintiff and the two disinterested witnesses both testifying that they were all present and defendant stating that he and plaintiff were alone at the time. In any event, during that meeting plaintiff informed defendant that he would buy the roofing business and asked him what the sale would include. Plaintiff stated that defendant told him it included the truck, equipment, stock on hand, good will of the business, and the use of the driveway as long as defendant lived. Kramer and Kirchner both corroborated plaintiff's testimony. Defendant, on the other hand, testified that he told the plaintiff the sale would include the truck, equipment, stock on hand,

the use of defendant's name, and the use of the driveway as long as plaintiff would pay $15.00 a month for the use of the garage and driveway. Plaintiff thereupon requested defendant to put the agreement in writing, but defendant said that would be unnecessary because of the friendly relationship between them; and they shook hands on their oral undertaking and agreed to meet the following Wednesday to take inventory and consummate the transaction. They met again on the following Wednesday afternoon at defendant's place of business and took inventory of the stock and equipment. The inventory placed a value of $1422.81 upon defendant's assets. They agreed that plaintiff was to pay defendant a monthly rental of $15.00. Plaintiff testified that this sum was for the use of half of the garage and defendant stated that it was for the use of part of the garage and driveway. Plaintiff continued to make these payments up to and including December 1940.

After the inventory was prepared the parties met again and plaintiff paid defendant the sum of $922.81 and gave him a chattel mortgage and notes for $500.00, which were subsequently paid. Thereafter plaintiff operated the roofing business, kept the equipment and materials in the garage at 445 Park avenue, and used the same driveway across the rear of the lot at 442 Park avenue for access to the garage.

Early in January 1941 defendant's son George, to whom his father had given the property at 445 Park avenue, notified plaintiff that thereafter the $15.00 was to be paid to him, as owner of the garage, instead of to his father. In September 1941, plaintiff purchased the property at 445 Park avenue from George Armstrong, and early in January 1942 defendant notified plaintiff that if he desired to use the driveway as a means of ingress and egress he would have to pay defendant $10.00 a month. He also served notice on plaintiff that he would

close the driveway on March 1, 1942. As a result of the notice served upon him, plaintiff filed his complaint and obtained a temporary injunction. The matter was then brought to issue and referred to a master.

The master's findings of fact are substantially as hereinbefore set forth and were incorporated in the decree. As conclusions of law the master found, and the decree held, that plaintiff's use of the driveway did not constitute an easement but did constitute a license; that to allow defendant to revoke the license under the circumstances would operate as a fraud upon plaintiff; that as a general rule a parol license is revocable, although a consideration has been paid or expenditures have been made upon faith of the agreement, but that equity will restrain the exercise of a legal right to revoke a license when the conduct of the licensor has been such that an assertion of legal title would operate as a fraud upon the licensee; that as between the parties there was a valid oral agreement creating a license for a definite period, namely, the life of the defendant, which was supported by a valuable consideration; and that by reason whereof plaintiff greatly altered and changed his position in the following respects: (1) plaintiff left the business where he was securely employed; (2) he purchased the premises at 445 Park avenue, fully relying on the agreement relative to his use of the driveway across the rear of 449 Park avenue and upon the friendly relationship between defendant and himself, which was necessarily an inducement to his entering into the agreement in the first place; and that by reason of the change in plaintiff's position, the revocation of the license by defendant and his assertion of the legal title to the premises involved, would, as a matter of law, constitute equitable fraud on the licensee. In view of defendant's assertion that he "has no quarrel with the con-

close the driveway on March 4, 1[illegible] served upon him, plaintiff filed [illegible] a temporary injunction. [illegible] and referred to a master.

The master's [illegible]

[illegible]

between defendant and others [illegible] ment to him coming into [illegible] that by reason of the change in [illegible] condition, the revocation of the license by defendant and his [illegible] of the legal title to the premises involved, would, [illegible] of law, constitute equitable fraud on [illegible]. In vie[illegible] of defendant's assertion that he "has no [illegible] with the con-

clusions of law of the Master and of the Court to the ef ect that a license was granted to plaintiff to use this driveway," the sole question presented is whether the evidence supports the conclusion that it would be an equitable fraud on plaintiff, by reason of his changed position, to allow defendant to revoke the license. Defendant practically conceds that plaintiff's version of the agreement with respect to the driveway is correct, for in the course of his argument relating to the evidence pertaining to defendant's conduct he says: "Giving plaintiff the benefit of everything shown by him and the implications reasonably arising from the evidence produced, the most this record shows for plaintiff would be, that the defendant told the plaintiff, as a part of the transaction in which the defendant sold his business to the plaintiff, that plaintiff could have the use of his (defendant's) driveway as long as the defendant lived. Thereafter the defendant received and accepted the monthly payments of $15.00, which he testified were for rent for the garage and the use of the driveway, until January 1, 1941." Plaintiff's evidence, corroborated by both Kirchner and Kramer, supports the finding that the oral agreement included the use of the right-of- ay over defendant's driveway as long as defendant lived. Having granted such a license, it would operate as a fraud upon plaintiff to revoke it under the circumstances disclosed by the record.

The general rule of law enunciated by the master, that a parol license is revocable, although a consideration has been paid or expenditures have been made upon the faith of the agreement, is supported by the decisions cited in defendant's brief (Baird v. Westberg, 341 Ill. 616, Boland v. Walters, 346 Ill. 184, and Lang v. Dupuis, 382 Ill. 101); but all these cases can be distinguished upon the facts, since in each instance the court either found that there was no evidence of fraud upon the party claiming the license or no proof that the use of the

[illegible] of law of the [illegible] to [illegible] that a license was granted to [illegible] the sole question presented [illegible] conclusion [illegible] reason of his [illegible] the license. [illegible] version of the [illegible] correct, for [illegible] evidence [illegible] plaintiff [illegible] pleadings [illegible] must [illegible] that said [illegible] the officials [illegible] life [illegible] [illegible] and [illegible] [illegible] January [illegible] [illegible] work [illegible] drive [illegible] license, [illegible] it under the circumstances [illegible]

The general rule of the [illegible] permit license is [illegible] paid or expenditures made [illegible] agreement, is supported on the [illegible] [illegible] (Haley v. Lumb, [illegible] 111. 616; Wilson v. [illegible], 340 Ill. 164; and Lane v. Dunlap, 262 Ill. 132); but all these cases can be distinguished upon the facts, since in each instance the court either found that there was no evidence of fraud upon the party claiming the license or no proof that the use of the

common driveway should be permanent or continue to exist for a fixed period of time; and in a number of the decisions cited by defendant the court, after finding that there was no evidence of fraud or that the agreement for a license did not cover a definite period, restated the exception to the rule that "courts of equity, however, will restrain the exercise of a legal right to revoke a license when the conduct of the licensor has been such that the assertion of the legal title would operate as a fraud upon the licensee." Lang v. Dupuis, supra.

In the case at bar there is sufficient evidence to support the finding that the agreement between the parties was definite and for the duration of defendant's lifetime; and to permit defendant now to revoke the license after the sale, after he had taken plaintiff's money and parted with title to the business, after plaintiff had relinquished the security of a position which he had held for five years, entered a new business and purchased the house and lot at 445 Park avenue, Glencoe, would permit the perpetration of an equitable fraud which courts of equity will not countenance; and in that situation the chancellor was fully warranted in granting the permanent injunction upon the record presented.

We are therefore of opinion that the decree of the Superior court should be affirmed, and it is so ordered.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

43253

327 I.A. 333

VIVIAN HELM,
Appellee,

v.

ELI KAPLAN and FAYE KAPLAN,
d/b/a AVENUE MOTOR SALES,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants for personal injuries alleged to have been sustained through the negligent operation of defendants' car while plaintiff was boarding a motorbus at the corner of 23rd street and Michigan avenue in Chicago on May 22, 1941. Defendants denied that they had any knowledge of the accident and that they were operating a motor vehicle at the time and place in question. When the matter first came on for trial May 11, 1943 and after plaintiff had testified, the court granted her counsel's motion to withdraw a juror and the case was then continued to July 1, 1943. In April of that year plaintiff's attorney of record was granted leave to withdraw from the case, and several days later the cause was dismissed for want of prosecution. Subsequently, pursuant to a petition alleging that the lawyer who had withdrawn from the case was engaged in the armed services, the cause was reinstated and set for trial on May 15, 1944. Trial by jury resulted in a verdict and judgment in favor of plaintiff for $2000, from which defendants appeal.

Plaintiff testified that the alleged accident occurred between ten and eleven o'clock in the forenoon. She stated that the car which struck her bore license plate No. 2317 and offered in evidence a certificate of the secretary of

state showing that automobile dealer's license No. 2317A for the year 1941 was issued to defendants. Upon objection the court reserved its ruling as to the admissibility of the document pending cross-examination. The offer of the exhibit was then withdrawn. Plaintiff then resumed the stand and testified that the car which struck her carried dealer's license plate No. 2317A for the year 1941, and on cross-examination admitted that she had testified at the previous trial that she did not know whether it was a dealer's license or not. She also stated that the plate bore light letters, either white or yellow, on a green background; but on cross-examination admitted that at the previous trial she had testified that the color of the license plate on the car which she claimed struck her was black and yellow. She first denied and then admitted that at the previous trial she testified that she did not see the automobile when she was getting on the bus, but stated that the car that struck her left the scene of the accident and proceeded south on Michigan avenue at a high rate of speed. And she went on to state that immediately thereafter she approached two police officers near the scene of the accident, at which time she observed with the police officers a car with license plate No. 2317A which was standing at the curb and that this was not the car which struck her; that she did not know whose car it was that hit her and that she did not know who was driving the car that caused her injury nor what make car it was, although at the previous trial she had stated that it was a Cadillac. She rested her case without connecting defendants with the alleged accident and with only the rebuttable presumption that dealer's license No. 2317A for the year 1941 having been issued to the defendants, the car was

state showing that automobile dealer's license No. 22174 for the year 1941 was issued to defendants. Upon objection the court reserved its ruling as to the admissibility of the document pending cross-examination. The offer of the exhibit was then withdrawn. Plaintiff then resumed the stand and testified that the car which struck her carried dealer's license plate No. 22174 for the year 1941, and on cross-examination admitted that she had testified at the previous trial that she did not know whether it was a dealer's license or not. She also stated that the plate bore letters, either white or yellow, on a green background, but on cross-examination admitted that at the previous trial she had testified that the color of the license plate on the car which struck plaintiff was black and yellow. On the trial and then admitted that at the previous trial she had stated she did not see the automobile [illegible] on the road, but stated that the car that struck her [illegible] of the accident and proceeded north, on Flatbush Avenue [illegible] of speed. And she went on to [illegible] that thereafter she approached two police officers [illegible] of the accident, at which time she observed with the [illegible] a car with license plate No. 22174 which was [illegible] the curb and that this was not the car which struck her; that she did not know whose car it was that hit her and that she did not know who was driving the car that caused her injury nor what make car it was, although at the previous trial she had stated that it was a Cadillac. She rested her case without connecting defendants with the alleged accident and with only the rebuttable presumption that dealer's license No. 22174 for the year 1941 having been issued to the defendants, the car was

owned and therefore must have been operated by or for the defendants.

As against this evidence Eli Kaplan testified that he was the owner of an automobile bearing dealer's license plate No. 2317A, which was a 1941 Cadillac; that during the morning in question his car was parked in front of his place of business, the Avenue Motor Sales Company, 2317 South Michigan avenue, at the west curb south of 23rd street, and that it had been parked at that place from about 9:30 in the morning until about 4:00 in the afternoon; that he did not get in the car or drive it during that period; that throughout that period he had the keys to the car; that no one else had them during that time; that the car stayed at the same place throughout that period and that he had no other automobile operating in that vicinity on the day of the alleged accident. He further stated that in the afternoon of the day in question police officers came to his place of business; that he and Mr. Gould, who was in his employ, were taken by the police officers to plaintiff's apartment on State street; that she was asked whether she could identify either one of them as being the man who drove the car that hit her, and that she did not so identify either of them.

Joseph Ryan, a police officer of the Chicago Park District, called as a witness on behalf of defendants, testified that on the morning in question while he was standing talking to Officer Connelly they were attracted by plaintiff's screaming and crying on the southeast corner; that when they approached her she was hysterical and told them that she had been hit and knocked down by a car across the street which backed into her as she was getting on a bus, and that the bus driver had told her the number of the car and told her to

owned and therefore must have been operated by or for the defendants.

As against this evidence Mr. Kaplan testified that he was the owner of an automobile bearing Ontario license plate No. 2Z17A, which was a light delivery; that during the morning in question his car was parked in front of his place of business, the Avenue Motor Sales Company, 2221 [illegible] avenue, at the west side north of [illegible] street, and that it had been parked at that place from about [illegible] in the morning until about 4:30 in the afternoon; that [illegible] the car or drive it during that period; that [illegible] period he had the keys to the car; that [illegible] during that time; that the [illegible] throughout the period [illegible] operating in that vicinity on the day of [illegible]. He further stated that in the afternoon of the day in question police officers came to his place of business; that he and Mr. Gould, who was in his employ, [illegible] officers to plaintiff's [illegible] was asked whether the truck [illegible] being the man who drove the car that day, and that he did not so identify either of them.

Joseph Ryan, a police officer of the Los Angeles district, called as a witness on behalf of defendants, testified that on the morning in question while he was standing talking to officer Donnelly they were attracted by plaintiff's screaming and crying on the southeast corner; that when they approached her she was hysterical and told them that she had been hit and knocked down by a car across the street which backed into her as she was getting on a bus, and that the bus driver had told her the number of the car and told her to

report it to the police officer on the corner, and that she said the number of the car was 2317; that she was asked whether it was a dealer's license because he remembered he had a record of checking a car across the street bearing that number on a dealer's license, and she said no; that the two officers then took her across the street and showed her the car to which they referred, and she said that was not the car; that they then checked the car and found it was owned by the Avenue Motor Sales; that they offered to take plaintiff to a doctor or hospital but she refused to go, saying that she lived on State street and would go home and take care of herself; that plaintiff rolled her stockings down to show them her injuries but they did not notice any marks on her legs; and that she then took a cab and drove away. Officer Connelly corroborated Ryan's testimony.

On rebuttal plaintiff testified positively that the man who was driving the car that she said struck her was the defendant Eli Kaplan, and admitted that shortly after the alleged accident happened the officers brought to her apartment a man who "resembled Mr. Kaplan"; that she was asked if she could identify him or the other man with him as the driver of the car, and that she told him that the driver in question resembled Mr. Kaplan but she wasn't certain.

The utter irreconcilability of the evidence is best indicated by the court's observation at the conclusion of the evidence, as follows: "Gentlemen, this case reeks with perjury. There has been wilful and wanton and gross perjury committed on that stand by either the plaintiff in this case or Mr. Kaplan. I don't know which of the two is lying. One of them is lying deliberately. I trust that whoever is committing the perjury-- I trust that future developments

report it to the police officer on the scene, and that he said the driver of the car [illegible]

Neither is use a defendant's incorrect [illegible] and a reason of attending a [illegible] that matter on [illegible] the two officers then [illegible] for the sake to [illegible] not the only [illegible] was [illegible] being [illegible] which [illegible] being [illegible] to [illegible] for [illegible] some [illegible]

[illegible]

[illegible] allegedly [illegible] ment a [illegible] if he could be [illegible] driver of the car, [illegible] question regarding [illegible] [illegible] a state.

The other [illegible] of the [illegible] indicated by the jury's [illegible] of the [illegible] the evidence, as follows: [illegible] perjury. There has been [illegible] committed on that stand by either the plaintiff in this case or Mr. Hagler. I don't know which of the two is lying. One of them is lying deliberately. I trust that whoever is committing the perjury-- I trust that future developments

disclose which is the guilty one. I don't know, but it stinks."

It appears from the evidence that license No. 2317 for the same year had been issued to one Loach for a private automobile, and that fact evidently produced confusion as to whether plaintiff had been struck, if at all, by No. 2317 or 2317A, which latter was a dealer's license.

After verdict and in support of their motion for a new trial, defendants presented the affidavits of Archie Vanier, the bus driver, John E. McCracken, an attorney of Davenport, Iowa, and of defendants' counsel, which set forth in substance that after plaintiff had testified on the first trial he (defendants' counsel) called the bus driver at the telephone number given in the report of the Accident Prevention Division of the Chicago Police Department; that Vanier recalled the accident and stated that he was not required to make a report until requested to do so because no one was injured; also that no one on behalf of the plaintiff had been in touch with him and that he had not been subpoenaed. The substance of this affidavit tended to rebut the statement of plaintiff's counsel at the first trial that the driver of the bus which she was attempting to board at the time of the alleged accident, would testify that he saw the car strike her and that he gave her the number of the car.

It appears that in his argument to the jury plaintiff's counsel referred to one of his professional witnesses as a "man who does the industrial surgery for the Rock Island Railroad, and associate physician for two insurance companies," and stated "so that I would not be criticized as to the type of doctor I bring forth, I went into defendants' field to

disclose which is the guilty one. I don't know, but it stinks."

It appears from the evidence that license No. 2317 for the same year had been issued to one Lozon for a private automobile, and that fact evidently produced confusion as to whether plaintiff had been struck, if at all, by No. 2317 or 2317A, which latter was a dealer's license.

After verdict and in support of his motion for a new trial, defendants presented the affidavits of Joseph Venker, the bus driver, John E. Johnson, an attorney of Davenport, Iowa, and of defendants' counsel, which set forth in substance that after trial had established on the direct trial he (defendants' counsel) called the bus driver at the telephone number given in the report of the accident to Division of the Chief of Police, apparently that he recalled the accident and stated that he was not required to make a report until requested to do so because no car was injured; also that no one on behalf of the plaintiff had been in touch with him and that he had not been subpoenaed. The substance of this affidavit tended to show that the statement of plaintiff's counsel at the direct trial, that the driver of the bus which she was attempting to board at the time of the alleged accident, would testify that he saw the girl strike her and that he gave her the number of the car.

It appears that in his argument to the jury plaintiff's counsel referred to one of his professional witnesses as a "man who does the industrial surgery for the Rock Island Railroad, and associate physician for two insurance companies," and stated "so that I would not be criticized as to the type of doctor I bring forth, I went into defendants' field to

find a man who would make a true examination and come in here and tell you what he found." Defendants' counsel objected to the remarks and asked that a juror be withdrawn and that the court declare a mistrial of the cause, but the court merely instructed the jury to disregard the statement as improper. We think these remarks in themselves were sufficient to reverse the judgment. As stated in Wiersema v. Lockwood & Strickland Co., 147 Ill. App. 33: "Many cases have been reversed for just such offense by counsel. *** There can be nothing more prejudicial to a defendant in a personal injury case *** than to have the jury told that if it will render a verdict in the case for the unfortunate plaintiff the defendant present, who is apparently making the defense, will not have to pay it but it will be paid by an absent real defendant, a foreign corporation. And counsel need not tell the jurors all that, for a suggestive remark is sufficient. Human nature, even in the jury box, is such that a multitude of instructions cannot cure the harm done." Volkman v. Brossman, 129 Ill. App. 182, Davidson v. Loomis, 282 Ill. App. 515, and Clark v. Hasselquist, 304 Ill. App. 41, are to the same effect. In this case the plain inference was that since defendants were in the automobile business and not a railroad, "going into the defendants' field" must mean the insurance business, and that an insurance company was defending the suit.

After a careful examination of the record we are satisfied that defendants did not have a fair trial, and since the cause is likely to be retried we refrain from commenting extensively on the evidence; nor do we think it necessary to discuss the other points raised.

Accordingly the judgment of the Superior court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Scanlan and Sullivan, JJ., concur.

time a man who would make a true examination and come in here and tell you what he found." Defendants' counsel objected to the remarks and asked that a juror be interrogated as to whether the court declare a mistrial or not. The court merely admonished the jury to disregard the statement as improper. We think these remarks in denying were sufficient to recover the judgment. As stated in Chicago, Rock Island & Pacific Ry. Co. v. Lefy 111. App. 32: "Many times have we held improper, that such efforts by counsel, ***" [illegible] to a defendant in a personal injury [illegible] to have the jury tell what it will render a verdict in the case. For the reasons [illegible] the judgment [illegible] is reversed and the cause remanded.

Reversed and remanded.

Scanlan and Sullivan, JJ., concur.

43371

327 I.A. 333

PETRONELLA DARASKA,
Appellee,

v.

ANNA DAUKSHA,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Petronella Daraska, brought suit in tort against Adam and Anna Dauksha for damages resulting from an alleged assault on plaintiff by Anna Dauksha. Adam Dauksha was subsequently dismissed from the proceeding and the cause went to trial against the remaining defendant. The court found for plaintiff and entered judgment in the sum of $2000.00 and costs, from which defendant appeals.

The parties had known each other for about 20 years. Anna Dauksha was formerly married to George Daraska, plaintiff's husband, and together they had operated a rooming house from 1914 to 1919. Adam Dauksha was one of their roomers. In 1919 defendant deserted her husband and their two children and subsequently in 1924 she married Adam Dauksha. Two years later plaintiff married defendant's former husband, George Daraska, and raised defendant's two children.

At the time of the alleged assault the Daukshas operated a tavern at 3238 South Halsted street, where George Daraska was an habitué, contrary to the wishes of his wife, Petronella. She was evidently incensed because her husband paid too much attention to his former wife and spent a large part of his earnings in her tavern. Shortly after noon on September 21, 1940 she went to the tavern to get her husband. An altercation ensued between plaintiff and defendant and ten minutes later plaintiff was found in an unconscious condition, lying face down

on the sidewalk in front of the tavern, with some of her hair pulled out, her right eye discolored and bulging, her clothing soiled and her body dirty to the hips. From X-rays taken at the hospital and other symptoms, her injury was diagnosed as a fractured skull.

The principal question presented is whether defendant committed the assault which caused the injuries. The evidence is irreconcilable on this phase of the case. Plaintiff testified that when she entered the tavern her husband was sitting at the bar; that after reprimanding him for being there and telling him to go home, he left the tavern; that when Anna Dauksha, who had evidently overheard the conversation between plaintiff and her husband, came from the kitchen with a big push-broom used for sweeping floors, plaintiff addressed her as follows: "Now, can you keep my husband, he gets drunk and come home, no pay and we got argument all the time together with each other, about eleven years when he go there"; that Anna Dauksha said nothing but came directly to the plaintiff and hit her on the head with the brush, whereupon plaintiff fell to the floor; that her last memory until she regained consciousness at the hospital three days later, was an attempt to reach for her glasses.

Defendant presents an entirely different version of the occurrence. She testified that plaintiff, speaking in Lithuanian, made deprecatory remarks as to defendant's character, and continuing to speak in Lithuanian, ordered her husband to go home, whereupon he replied: "Why don't you go home and stay home? There is your place at home," and that he left the tavern immediately; that defendant came from the kitchen and told plaintiff not to make any noise or trouble, whereupon plaintiff approached defendant and tried to slap her with a hand bag, but when defendant warded off

the blow with her hands, plaintiff threw the bag away; that defendant just touched the plaintiff's hands and pushed her away and told her to get out; that defendant had a broom but threw it away when the argument started; that plaintiff was standing about 12 feet from an open door leading into the tavern and backed out of the room through the screen door, which was covered by a cloth, and disappeared. Immediately thereafter she was found lying on the sidewalk in front of the door, face down and in the condition heretofore described.

The only plausible explanation of the condition in which plaintiff was found after she is alleged to have backed out of the tavern through the screen-doored entrance, is that she was assaulted in the tavern and dragged out by the hair to the sidewalk and allowed to remain there. Although two or three of defendant's witnesses knew she was lying outside the tavern, they evinced no desire to assist her. This circumstance, so fraught with suspicion and so contrary to the natural reaction of human beings in like circumstances, led the trial judge to conclude that they were not telling the truth as to the assault. The suggestion by defendant that plaintiff may have been assaulted after she left the tavern by some unknown person is fantastic. It was broad daylight, and there is nothing whatever to support this conjecture. Nor does the theory that she fell and was injured while backing out of the door harmonize with the facts. She was found lying face downwards, with a frontal fracture of the skull, and some of her hair lying beside her. Her right eye was discolored and bulging, her clothing soiled and her body dirty to the hips. A backward fall would not be likely to cause a frontal skull fracture, and plaintiff's general disheveled condition could not have resulted from a single fall. In any event, the trial judge who heard the witnesses was in a better

position than are we to pass upon the credibility of the witnesses and to ascertain the facts, and we would not be justified on the record presented in holding that the finding and judgment were contrary to the manifest weight of the evidence.

One of the defenses interposed is that plaintiff did not file a replication denying the allegations of the amendment to the answer that defendant acted in self-defense and used only such force as was reasonably necessary to eject plaintiff from defendant's place of business; and that such allegations should be held to have been admitted and judgment entered for defendant. The record discloses that defendant's answer consisted of two pleas, the general issue and a special plea of self-defense. Despite the fact that no replication was filed, defendant went to trial upon the issues as made up by the pleadings and presented her entire case, including the plea of self-defense. Under the circumstances the requirement of filing a replication was waived. Illinois Steel Co. v. Novak, 184 Ill. 501; Motusas v. Acme Burial Ass'n, 319 Ill. App. 106; Cairo Lumber Co. v. Ladenberger, 313 Ill. App. 1; Scholz v. Commissioners of Lincoln Park, 264 Ill. App. 409. Moreover, the record discloses no justification for the assault, if the assault was committed. Defendant's own testimony shows that plaintiff did not lay her hands on defendant, nor did the opprobrious epithets in which plaintiff is alleged to have indulged in Lithuanian justify the assault. Mere words, no matter how abusive, cannot justify an assault. Sorgenfrei v. Schroeder, 75 Ill. 397.

The remaining ground for reversal is that the judgment was excessive. The record contains X-ray pictures which two reputable physicians analyzed as revealing a fracture of the skull extending from the ethmoid region of the skull and

running into the parietal bone on the right side. Dr. Vaughn, the attending physician, stated that further evidence of the skull fracture was shown by the swelling, bulging and discoloration of the right eye, plus plaintiff's unconsciousness for three days. Dr. Greenspahn also testified that the X-rays indicated a definite fracture line and that unconsciousness for three days would indicate that there had been an involvement of the brain. Another expert witness, Dr. Albert C. Field, was of opinion that the line in question shown in the X-rays did not disclose a fracture and stated that when examined under a magnifying glass it indicated a receptacle for blood vessels, and he believed that it would be impossible to create a skull fracture by striking one with a broom. However, if plaintiff was struck with the wooden portion of the broom, any layman might well conclude, as did two of the three medical experts, that such a blow could produce a fracture. The trial judge, listening to the testimony of all the experts and having had the benefit of their explanation of the X-ray pictures in evidence, concluded that plaintiff sustained a skull fracture. Since we think that finding is sustained by the record, the sum of $2000.00 is not excessive. Plaintiff was an industrious person who had worked steadily for 19 years and earned an average of $30.00 a week, besides attending to the household, and had been in good health before the assault. She lost approximately $600.00 in salary, was confined to the hospital for three weeks and had medical attention for five months, to say nothing of the pain and suffering that must have resulted from so serious an injury.

The case was fairly tried, and after a careful reading of the record we have reached the conclusion that the finding and judgment are sustained by the evidence and that the judgment for $2000.00 should therefore be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

327 I.A. 334

43293

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| RELACO ROSIN PRODUCTS, INC., a corporation, Appellee, | ) | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |
| v. | ) | |
| NATIONAL CASEIN COMPANY, a corporation, Appellant. | ) | |

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action to recover a judgment against National Casein Company, a corporation, and Louis T. Cook for certain merchandise sold by plaintiff. Plaintiff dismissed the cause as to Cook. A jury returned a verdict finding the issues for plaintiff and against defendant, National Casein Company, and assessing plaintiff's damages at $5,565.89. Defendant appeals from a judgment entered upon the verdict.

This was the second trial of this case. Upon the first trial, the court, upon motion of the defendants, directed the jury to return a verdict for them; the plaintiff appealed from the judgment entered upon the verdict (Relaco Rosin Products Co., Inc. v. National Casein Co., 321 Ill. App. 159, Abstract Opinion), and we reversed the judgment and remanded the cause for a new trial. In considering the instant appeal we found it helpful to refer to the opinion we filed upon the first appeal, wherein we said:

"Plaintiff strenuously contends that it made out a prima facie case against both defendants and that the trial court erred in directing the verdict.

"Plaintiff is a Florida corporation with its principal place of business at Jacksonville, Florida. It processes and manufactures rosin, rosin size, and other derivatives of rosin. Defendant company has its principal place of business at Chicago. It makes casein, a milk product, which, like rosin size, is used

43293

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|---|---|
| MELACO ROSIN PRODUCTS, INC., a corporation, Appellee, | ) |
| v. | ) APPEAL FROM MUNICIPAL |
| NATIONAL CASEIN COMPANY, a corporation, Appellant. | ) COURT OF CHICAGO. |

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action to recover a judgment against National Casein Company, a corporation, and Louis A. Cook for certain merchandise sold by plaintiff. Plaintiff dismissed the cause as to Cook. A jury returned a verdict finding the issues for plaintiff and against defendant, National Casein Company, and assessing plaintiff's damages at $3,[illegible].30. Defendant appeals from a judgment entered upon the verdict.

This was the second trial of this cause. Upon the first trial, the court, upon motion of the defendants, directed the jury to return a verdict for them; the plaintiff appealed from the judgment entered upon the verdict (Melaco Rosin Products Co., Inc. v. National Casein Co., 321 Ill. App. [illegible] Abstract Opinion), and we reversed the judgment and remanded the cause for a new trial. In considering the instant appeal we think it helpful to refer to the opinion we filed upon the first appeal, wherein we said:

"Plaintiff strenuously contends that it made out a prima facie case against both defendants and that the trial court erred in directing the verdict.

"Plaintiff is a Florida corporation with its principal place of business at Jacksonville, Florida. It processes and manufactures rosin, rosin size, and other derivatives of rosin. Defendant company has its principal place of business at Chicago. It makes casein, a milk product, which, like rosin size, is used

in the manufacture of paper. Defendant Cook is president of defendant company. John O. Lewis is president of plaintiff company. On August 17, 1936, a contract was executed between plaintiff and defendant company, which provides that plaintiff has the facilities for manufacturing large quantities of rosin size, that defendant company was in a position to market that product, and it was mutually agreed that defendant company would purchase from plaintiff all of the rosin size for which it had a market, and plaintiff would sell the same to defendant company for a period of five years, subject to certain cancellation provisions. The contract also provides that rosin size delivered should be invoiced by plaintiff to defendant company on a sight draft basis on the day of shipment, on a net cash basis f. o. b. Jacksonville, Florida. There is evidence tending to show that defendants desired to become, in effect, brokers for plaintiff's product, but that they did not wish by so doing to jeopardize their own business, which was similar to plaintiff's in that the products of both companies were used in the manufacture of paper; that defendant Cook felt that it would be harmful to defendants' business if it became known that defendant company was selling plaintiff's product in competition with firms which were selling defendant company's casein, and for that reason defendants desired to continue the said contract but to have the product sold to defendant corporation by plaintiff handled through a separate corporation, which should operate as an agency for them; that in order to accomplish their object, defendants intended to have the mills to whom defendants were selling plaintiff's rosin size believe that they were obtaining the rosin size from the producer and shipper, and that in furtherance of this purpose defendant Cook organized a new corporation, which was called the Southern Chemical Corporation, which name was intended to indicate that it was a

in the manufacture of paper. [illegible]
defendant company. [illegible]
company. On August 31, 1920, a contract was entered between
plaintiff and defendant company, which provided that plaintiff
was the [illegible]
rosin size, but defendant company [illegible]
that product, and in accordance therewith defendant company
[illegible] plaintiff [illegible]
it had a market, and plaintiff [illegible]
company for a period of [illegible]
collection provisions. [illegible]
size daily and would be [illegible]
company on a night [illegible]
not only that, [illegible] defendants
defendants testified to a [illegible]
effect, however, [illegible]
with by so doing, [illegible]
similar to pl. [illegible]
were used in the manufacture [illegible]
that it would be impossible to [illegible]
known that defendant company [illegible]
competition with [illegible]
cases, and for that reason [illegible]
said contract not to have the protection [illegible]
tion by plaintiff [illegible] to defendant company, which
should operate as an agency for them, that in order to accomplish
their object, defendants intended to have the [illegible] to whom de-
fendants were selling plaintiff's rosin size believe that they
were obtaining the rosin size from the processor and shipper,
and that in furtherance of this purpose defendant Cook organized
a new corporation, which was called the Southern Chemical
Corporation, which name was intended to indicate that it was a

southern company, because rosin was obtained from the south, and defendants arranged for shipments to be made by plaintiff in the name of Southern Chemical Corporation and for plaintiff to accept the return of empty drums at Jacksonville, because defendants thought that it might be detrimental to their purpose if it became known to the customers that Southern Chemical Corporation did not have a plant in the south; that that corporation did not have any plant anywhere but was merely a one man agency located at Mt. Vernon, New York, where the corporation was organized; that defendant Cook made E. Y. Burckhalter president of the Southern Chemical Corporation and sent him money to open an account for that corporation in a Mt. Vernon bank and directed him to sign checks as president of the Southern Chemical Corporation; that plaintiff was ordered by defendants to make all shipments in the name of Southern Chemical Corporation of New York as consignor; that all of the goods so shipped by plaintiff were paid for save the shipments for which suit is brought. The evidence of plaintiff also tends to show that Burckhalter, on September 2, 1937, wrote to Cook, advising him that he had found a new rosin size connection whose product was cheaper than plaintiff's product and he suggested transferring their rosin size business to the other company when it would be ready for operation; that defendant company, by Cook, in a letter dated September 4, 1937, practically endorsed Burckhalter's plan of transferring the business to another company; that Burckhalter, on September 7, 1937, wrote Cook a letter in which he stated, <u>inter alia</u>: 'However, I think it advisable to give him [the president of plaintiff corporation] the necessary support until we are able to transfer shipments to Goodyear Yellow Pine as we have contracts and commitments ahead which we must fill pending our transfer of shipments to Picayne, Miss. Confidentially, you need have no fear of Lewis carrying on a Size business

southern company, from [illegible]
and defend [illegible] engaged [illegible]
in the name of [illegible]
to accept the [illegible]
determined [illegible]
if it became [illegible]
position will not have [illegible]
did not have any [illegible]
loaded [illegible]
[illegible] that [illegible] Shareholders [illegible]
of the [illegible]
in accord [illegible]
[illegible] to [illegible]
[illegible] tion [illegible]
shipments in the [illegible]
look as [illegible]
were [illegible]
evidence of [illegible]
September 5, 1947, [illegible]
a new [illegible]
plaintiff [illegible]
also business to [illegible]
operation that [illegible]
September 5, 1947, [illegible] plan of
transferring the business to [illegible]
on September 1, 1947, [illegible]
Index Line: However, I think it would be [illegible]
President of plaintiff corporation [illegible]
we are able to transfer shipments to [illegible]
have contracts and commitments ahead which we must fill pending
our transfer of shipments to Niagara. Meanwhile, confidently,
you need have no fear of Davis carrying on a same business

without us. He hasn't got what it takes.' The evidence also tends to show that Cook controlled the defendant company and the Southern Chemical Corporation. If it were necessary, we might state other facts and circumstances shown by the record that tend to support plaintiff's theory of fact. * * * In this connection it must be borne in mind that agency, like any other fact, may be shown by direct or circumstantial evidence. 'The agency may be established and its nature and extent shown by parol evidence, whether it be direct or circumstantial. If there be doubt about the extent of the agency and the authority of the agent to bind the principal, reference may be had to the situations of the parties and the property, acts of the parties, and other circumstances germane to the question. In other cases it is held, where the evidence shows one acting for another under circumstances implying a knowledge on the part of the supposed principal of such acts, a prima facie case of agency is established. Doan v. Duncan, 17 Ill. 272; Rockford, Rock Island and St. Louis Railroad Co. v. Wilcox, 66 id. 417.' (Mitchell v. McEwen Associates, 360 Ill. 278, 283, 284.)

"The theory of plaintiff was that defendant company was liable under the contract of August 17, 1936, and that defendant Cook was liable in the alternative; that defendants used the Southern Chemical Corporation as a dummy corporation and that that corporation and Burckhalter, its president, were agents of defendants, under the contract, in the matter of the transactions with plaintiff, including the shipments for which plaintiff sues. It was the theory of defendants 'that the sales of merchandise for which this suit was brought were made by the plaintiff to the Southern Chemical Corporation and not to either of the defendants, and that the defendants did not have any connection, directly or indirectly, with such purchases by the Southern Chemical Corporation from the plaintiff'; that 'the plaintiff

[illegible]

"The theory of [illegible]

[illegible] Liable in [illegible]

[illegible] Chemical Corporation [illegible]

that corporation and [illegible]

of defendants, and [illegible] the contract, in [illegible] of the transac-

tions with plaintiff, including the shipment [illegible] which plaintiff

sues. It was the theory of defendants that the loss of mer-

chandise for which this suit was brought was made by the plain-

tiff to the Southern Chemical Corporation and not to either of

the defendants, and that the defendants did not have any connec-

tion, directly or indirectly, with such purchases by the Southern

Chemical Corporation from the plaintiff; that the plaintiff

failed to make out a prima facie case against the defendants so that a directed verdict was a necessary consequence.'

"'"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297.)' (Mahan v. Richardson, 284 Ill. App. 493, 495. See, also, Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597.)

"After a careful consideration of the evidence, viewed in the light of the foregoing principles of law, we have reached the conclusion that there is undoubtedly evidence sufficient to make out a prima facie case for plaintiff against defendants. In our judgment it would amount to a miscarriage of justice to permit the instant judgment to stand."

It is clear that this case, upon the second trial, was well tried, as there is an absence of certain errors that are usually assigned in cases like the instant one. In support of its appeal, defendant raises only two points: (1) The court erred in overruling defendant's motion for a directed verdict at the close of all the evidence, and in overruling defendant's motion for a judgment notwithstanding the verdict;

failed to make out a prima facie case against the defendant so that a directed verdict was properly in order.

"A motion to dismiss [illegible] defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence is to be taken in aspect most favorable to the plaintiff, [illegible] reasonable inferences and [illegible] strongly in favor of the plaintiff. [illegible] judgment, and if a or [illegible] circumstances [illegible] motion is [illegible] prove the plaintiff's [illegible] of the court of [illegible] evidence, [illegible] appellant. [illegible] 40, 41, 42, 43, [illegible] 100, 101.

Rather [illegible] in the light of the [illegible] the conclusion that there is [illegible] made out. [illegible] in our judgment it would [illegible] to permit the instant judgment to stand.

It is clear that in the case, [illegible] second trial, will arise, as there is no [illegible] matters that [illegible] usually assigned in cases like the instant one. In support of its appeal, defendant raises only two points: (1) the court erred in overruling defendant's motion for a directed verdict at the close of all the evidence, and in overruling defendant's motion for a judgment notwithstanding the verdict;

and (2) the court erred in overruling defendant's motion for a new trial. Upon the oral argument counsel for defendant conceded that defendant's main reliance is upon point (2), that is based upon the contention that the verdict was against the manifest weight of the evidence, and counsel further conceded that the determination of this appeal turns upon pure questions of fact. We may say, however, as to point (1), that as the evidence submitted by plaintiff upon the instant trial is as strong, if not stronger, than it was upon the first trial, there is no good reason why we should not adhere to the conclusion we reached in our former opinion that plaintiff made out a prima facie case. Moreover, upon the instant appeal the trial court in passing upon defendant's motion for a directed verdict at the close of all the evidence and in passing upon defendant's motion for judgment notwithstanding the verdict had to consider any evidence introduced by defendant that might be favorable to plaintiff. (See Merlo v. Public Service Co., 381 Ill. 300, 311.) That some of that evidence tends to support plaintiff's case cannot be reasonably disputed, and in passing upon defendant's point (2) we must consider that evidence.

Upon this appeal each of the parties adhered to the theory advanced upon the first trial. Our former opinion states these theories. That certain evidence introduced by defendant tends to rebut plaintiff's theory of fact may be conceded. As we read the record, we find certain mountain peaks in the evidence that tend strongly to support plaintiff's theory that defendant and L. T. Cook used the Southern Chemical Corporation as a dummy corporation and that it and Burckhalter, its president, were agents of defendant corporation in the matter of the transactions with plaintiff. The jury were fully warranted in finding that L. T. Cook controlled defendant corporation; that

and (2) [illegible] in [illegible] for a new trial. [illegible] concluded that [illegible] upon point [illegible] that is based upon the contention that the verdict was against the manifest weight of the evidence, and [illegible] contended that the determination of [illegible] upon questions of fact. [illegible] as the ordinance [illegible] [illegible] [illegible] out [illegible] the trial court [illegible] directed a verdict [illegible] upon determining the motion [illegible] fact to constitute [illegible] be favorable to defendant. [illegible] 321 Ill. 247, 251.) Since [illegible] plaintiff's case [illegible] upon defendant's [illegible] [illegible] defendant.

[illegible] take [illegible] to the theory advanced upon the trial. [illegible] these theories. That certain [illegible] by defendant tends to make plaintiff's theory of [illegible] be considered. As to read the record, we find [illegible] in the evidence that tend [illegible] to support plaintiff's theory that defendant and L. T. Cook used the bookkeeper [illegible] corporation as a dummy corporation and that it was [illegible], its president, were agents of defendant corporation in the matter of the transactions with plaintiff. The jury were fully warranted in finding that L. T. Cook controlled defendant corporation; that

he organized and controlled the Southern Chemical Corporation; that he made Burckhalter president of that company; himself secretary; his son treasurer, and made the three the directors of the corporation. The jury were justified in giving weight to the evidence that showed the purpose for which that company was organized. In our former opinion we stated the purpose, as shown by plaintiff's evidence. The first sale of rosin size under the contract was an order of eighty drums, which were shipped directly to Albemarle Paper Manufacturing Company in accordance with directions given by Burckhalter in a letter sent by him to plaintiff on September 11, 1936, in which Burckhalter said: "The consignor should be as always Southern Chemical Corporation," and plaintiff was directed to draw a draft on defendant through the First National Bank of Chicago in payment of the order. Plaintiff drew the draft as directed and it was paid by defendant on September 15, 1936. The Southern Chemical Corporation had no plant nor office at Jacksonville and in November, 1936, plaintiff was advised that empty drums were being returned by the northern mills to Jacksonville, Florida, consigned to Southern Chemical Corporation, and directing plaintiff to advise the railroad to turn the empty drums over to plaintiff because, otherwise, the customers of Southern Chemical Corporation might learn that it was not located at Jacksonville and that this knowledge would be very detrimental. When Burckhalter was injured in an automobile accident about March 11, 1937, and was confined to the hospital and his home for several weeks, defendant, through Cook, at once took charge of the affairs of the Southern Chemical Corporation. At the time of the accident two shipments of rosin size were in the course of delivery. A draft drawn by plaintiff covering one of the shipments was not paid when presented to the bank of Southern Chemical Corporation

he organized and controlled the Southern Chemical Corporation; that he made Turnbaugh president of that company; himself secretary; his son treasurer, and made the three the directors of the corporation. The jury were justified in giving weight to the evidence that showed the purpose for which that company was organized. In our former opinion we stated the purpose, as shown by plaintiff's evidence. The first sale of rosin under the contract was an order of [illegible] drums, which were shipped directly to Albemarle Paper and Printing Company in accordance with directions given by Turnbaugh in a letter sent by him to plaintiff on September 11, 1936, in which Turnbaugh said: "The consignor should be as always Southern Chemical Corporation," and plaintiff was [illegible] to issue a draft on defendant through the Atlant National Bank of Charlotte in payment of the order. Plaintiff's draft the draft as directed and it was paid by Lois Bank on September 14, 1936. The Southern Chemical Corporation had no plant nor office at Jacksonville and in November, 1936, plaintiff was advised that empty drums were being returned by the Northern Mills to Jacksonville, Florida, consigned to Southern Chemical Corporation, and directing plaintiff to advise the railroad to turn the empty drums over to plaintiff because, otherwise, the customers of Southern Chemical Corporation might learn that it was not located at Jacksonville and that this knowledge would be very detrimental. When Burckhalter was injured in an automobile accident about March 11, 1937, and was confined to the hospital and his home for several weeks, defendant, through Cook, at once took charge of the affairs of the Southern Chemical Corporation. At the time of the accident two shipments of rosin size were in the course of delivery. A draft drawn by plaintiff covering one of the shipments was not paid when presented to the bank of Southern Chemical Corporation

at Mount Vernon, New York. Plaintiff then made a demand upon defendant for payment and was informed by it that the draft would be paid. Defendant advised the Mount Vernon bank of Burckhalter's accident and that it had directed plaintiff to put the draft through again, and authorized the bank to pay the draft and, if necessary, to communicate with defendant's bank in Chicago and to charge the expenses to defendant or the Southern Chemical Corporation. On the other shipment, which went forward on March 29, 1937, plaintiff, at the request of defendant, drew its draft upon defendant, and it was paid. When Burckhalter returned to work defendant advised him that plaintiff could draw on defendant through the First National Bank of Chicago or that defendant could send a check to Southern Chemical Corporation to meet the drafts of plaintiff. On September 2, 1937, Burckhalter wrote to L. T. Cook advising him that he had found a new rosin size connection that had offered to supply their requirements at a less price than that charged by plaintiff; also advising Cook that two drafts, in the sum of $3,648.16, were due plaintiff on September 9, and requesting that Cook take care of the payments as he had previously done and that he, Burckhalter, would remit promptly upon collection as he had theretofore done. Defendant replied on September 4, 1937, stating that they were short of money and inquiring how long the money would be tied up should they meet the drafts. That defendant approved of Burckhalter's suggestion that they transfer the rosin size business from plaintiff to another company is shown by a letter written by the National Casein Company by Louis T. Cook, on September 4, 1937. On September 7, 1937, Burckhalter sent a letter on the stationery of the Southern Chemical Corporation to plaintiff, which reads in part: "I have written Mr. Cook (and upon receipt of his

at Mount Vernon, New York. Bankrupt then made a demand upon defendant for payment and was informed by it that the draft would be paid. Defendant advised the Mount Vernon Bank of Burckhalter's accident and that it had directed it itself to put the draft through again, and authorized the bank to pay the draft and, if necessary, to commute to with defendants bank in Chicago and to charge the expense to defendant or the southern chemical corporation. [illegible] which work [illegible] on March 23, 1927, at the request of defendant, [illegible] draft [illegible] and it was paid. When Burckhalter [illegible] to work [illegible] that plaintiff could draw on defendant through the First National Bank of Chicago or that defendant would [illegible] to southern Chemical Corporation to meet the drafts of plaintiff. On September 2, 1927, Burckhalter wrote to [illegible] Cook explaining him that he had found a new market where arrangements had offered to supply their requirements at a less price than that charged by plaintiff; also enclosing look that two months, in the sum of $3,642.10, were due plaintiff on September 2, and requesting that Cook take care of the payments as he has previously done and that he, Burckhalter, would remit promptly upon collection as he had theretofore done. Defendant replied on September 4, 1927, stating that they were short of money and inquiring how long the money would be tied up should they meet the drafts. That defendant approved of Burckhalter's suggestion that they transfer the rosin also business from plaintiff to another company is shown by a letter written by the National Casein Company by Louis T. Cook, on September [illegible], 1927. On September 7, 1927, Burckhalter sent a letter on the stationery of the Southern Chemical Corporation to plaintiff, which reads in part: "I have written Mr. Cook (and upon receipt of his

reply will telegraph or phone you tomorrow) asking that he accept the two drafts due on Sept. 9th at sight for payment through Chicago. In this connection, if Mr. Cook accepts the draft will you please redraw the Mohawk to allow for the credit which we have sent them." On September 7, 1937, Burckhalter wrote L. T. Cook a letter thanking him for his letter of September 4 and assuring him that the Mohawk shipment of August 3 would be paid by September 25 and that the money would be returned to defendant by that time if defendant saw fit to meet the draft. In the same letter Burckhalter said: "Inasmuch as Lewis is in our debt because of faulty shipments and non-allowance for empty drums returned, we have the alternative of repudiating his drafts which we have a perfect right to do. However, I think it advisable to give him the necessary support until we are able to transfer shipments to Goodyear Yellow Pine as we have contracts and commitments ahead which we must fill pending our transfer of shipments to Picayne, Miss. Confidentially, you need have no fear of Lewis carrying on a Size business without us. He hasn't got what it takes." On September 7, 1937, plaintiff advised defendant by telegram that two certain drafts totaling $2,571.85 had been returned unpaid from Southern Chemical Corporation. Defendant replied to this telegram by letter of September 9, 1937, advising plaintiff that they had taken the matter up with Burckhalter who stated that a check had been sent to plaintiff on one draft and that Burckhalter would take up with plaintiff direct the matter of the other draft. On October 18, 1937, the following letter was sent to plaintiff:

"Referring to your telegram of October 13th, our telegraphic reply and letter of October 13th and also our telephone conversation of today, wish to advise that neither the writer nor the National Casein Company ever guaranteed the Southern

reply will telegraph or phone you tomorrow) making that we accept the two drafts due on Sept. 5th at sight for payment through Chicago. In this connection, if Mr. Coon accepts the draft with you please return the bills of lading for the cattle which we have sent them." On September 7, 1927, Bartholmiter wrote R. T. Coon a letter demanding payment for his letter of September 4 and asserting that the following shipment of cattle would be paid by Sept. 8th and that the money would be returned to defendant by that time if defendant was not to meet the draft. In this same letter Bartholmiter wrote: "Remember, Mr. R. T., in case we will because of family sickness and non-life come for cattle, return it at once." We have no other reason of arguing why the cattle which we have a perfect right to do. However, I think it advisable to give him the benefit of my argument which was made to Bartholmiter shipments to Joplin. Mr. R. T. Coon may have [illegible] and remember when we had taken no part that pending our [illegible] of shipments to Kansas City, [illegible] "[illegible] of South Carolina or a Mr. [illegible] Lemont Co. [illegible] get what it takes." On September 7, 1927, plaintiff received defendant's telegram that [illegible] totaling $[illegible] had been returned unpaid from Northern Oklahoma Commission Company. Plaintiff replied to this telegram by letter of September 9, 1927, advising plaintiff that they had taken [illegible] up with Bartholmiter who stated that a draft had been sent to plaintiff on one draft and that Bartholmiter would take up with plaintiff direct the matter of the other draft. On October 10, 1927, the following letter was sent to plaintiff:

"Referring to your telegram of October 13th, our telegraphic reply and letter of October 13th and also our telephone conversation of today, wish to advise that neither the writer nor the National Casualty Company ever guaranteed the Southern

Chemical Corporation's account with you, nor did either the National Casein Company nor the writer request you to extend credit to the Southern Chemical Corporation for its purchases.

"We were of the opinion that all the business which you did was sight draft, bill of lading attached with the Southern Chemical Corporation. At no time were we advised of any change in this method of billing.

"We desire to give you notice that the National Casein Company, or the writer, will not be responsible for purchases made by anyone other than the National Casein Company.

"(Signed) National Casein Company
"Louis T. Cook,
"President."

The jury had a right to view this letter in the light of the fact that before it was written Cook and Burckhalter had been scheming to buy the product in question from another company at a price less than they were paying plaintiff and that they were keeping plaintiff in the dark as to their purpose until they were sure that they would be able to obtain the merchandise from the other company. As to the alleged change in the method of billing that defendant refers to in the above letter, Lewis testified that the change was made at the instance of Cook and Burckhalter. He further testified that upon several occasions after the receipt of the letter of October 18, 1937, he talked with Cook about the matter and that the latter told him to try to collect the account from the Southern Chemical Corporation, to keep dunning them because it had money coming in from a contract between the Goodyear Yellow Pine and the U. S. Gypsum Company and that it should have enough money from that other contract to pay off plaintiff's account; that Cook further stated that he felt that the account would be straightened out through moneys coming in, but that if it was not paid in full he would take care of

Chemical Corporation's account with you, nor did either the National Lead Company nor the writer report to you as being credit to the Southern Chemical Corporation for its "medicine".

"We are of the opinion that all the business which you did was right direct, full of liking and with the Southern Chemic l Corporation. At no time were we advised of any change in this method of billing.

"We hasten to give you credit at the National Lead Company, or the writer, will not be responsible for purchases made by anyone other than the National Lead Company.

"( Signed) National Lead Company
Cole , Jr.,
General Mgr."

The jury had a right to view this letter in the light of the fact that before it was sent in evidence, Wadsworth had been claiming to lay the blame for overbilling from another company at a price less than they were paying National Lead and that they were keeping National in the dark as to their purpose until they were ready to bring out the evidence from the other company. The change in billing change in the method of billing came to the knowledge of the above letter, Jones testified that the change was made at the instance of Cook and Wadsworth. He further testified that upon several occasions after the receipt of the letter of October 16, 1924, he talked with Cook about the matter and that the latter told him to try to collect the account from the Southern Chemical Corporation, to keep dunning them because it had money coming in from a contract between the Goodyear Yellow Pine and the U. S. Gypsum Company and that it should have enough money from that other contract to pay off plaintiff's account; that Cook further stated that he felt that the account would be straightened out through moneys coming in, but that if it was not paid in full he would take care of

the account in Chicago. The total amount that was not paid plaintiff was $5,565.89. There is no dispute as to the amount. The jury and the trial court believed plaintiff's theory of fact and disbelieved the defense interposed to the claim.

Defendant contends that the contract of August 17, 1936, contained a provision that the defendant might assign the contract to any active and solvent corporation in which the stockholders of defendant would hold the controlling interest; that it alleged in its answer that the interest of defendant in the contract was assigned to Southern Chemical Corporation and that that company was solvent at the time defendant assigned the contract to it on October 18, 1936, and that the stockholders of defendant corporation held the controlling interest in the Southern Chemical Corporation at the time of the assignment. This belated defense is an afterthought and the jury would have been fully warranted in finding that the alleged assignment was but a subterfuge to escape responsibility. The statement made in defendant's brief that plaintiff in its reply failed to deny the allegations in defendant's answer as to the alleged assignment is entirely unwarranted. Plaintiff, in its reply, specifically denied that the interest of defendant in the said contract was with the knowledge and consent of plaintiff assigned to Southern Chemical Corporation. Defendant introduced no written assignment in evidence, and it is significant that there is no mention in the entire correspondence of the parties as to the alleged assignment. If there had been in fact an assignment it would have been the duty of defendant to notify plaintiff. A fortiori, if defendant had made a bona fide assignment on October 18, 1936, why did it long thereafter take an active interest and partici-

the account in [illegible] plaintiff was [illegible]. There is no [illegible] the record, the jury and the trial court had [illegible] of fact that plaintiff and the defendant [illegible].

[illegible] 11, 1950, contained a provision [illegible] tract to [illegible] holders of [illegible] it alleged in [illegible] contract [illegible] that that [illegible] the contract [illegible] holders of [illegible] in [illegible] [illegible] dated [illegible] [illegible] and [illegible] that [illegible] reply [illegible] to the alleged [illegible] tiff, in the [illegible] of defendant in [illegible] consent of plaintiff [illegible] operation, defendant into [illegible] It is significant that [illegible] that correspondence of the parties [illegible] assignment. If there had been in fact an [illegible] would have been the duty of defendant to notify plaintiff. A fortiori, if defendant had made a bona fide assignment on October 18, 1950, why did it long thereafter take an active interest and partici-

pation in the affairs of the Southern Chemical Corporation?

In the case of Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, we said (p. 15): "It is the province of the jury to determine the credibility of witnesses and the weight to be given their testimony. They may test the truth and weigh the evidence by their knowledge and judgment derived from experience, observation and reflection. 'There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review,' (Mills & Co. v. Duke, 232 Ill. App. 277.) In Mirich v. Forschner Contracting Co., supra [312 Ill. 343], the court said (p. 358): 'One of the recognized benefits of trial by jury is that the jury sees and hears the witnesses, which gives them superior advantage over a reviewing court in determining the credibility of the witnesses and the weight and credit that should be given their testimony.'"

Defendant's contention that the verdict of the jury was against the manifest weight of the evidence assumes that plaintiff made out a prima facie case. In People v. Hanisch, 361 Ill. 465, 468, the court said: "Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean

[illegible] in the affairs of the Southern Morelos [illegible]?

In the case of Hopkovich v. Cochran, [illegible] 2d, 263 Ill. App. 3, [illegible] 1931: "It is the province of the jury to determine the credibility of witnesses and the weight to be given their testimony. [illegible] the truth and which the evidence [illegible] disbelieve from circumstances, our [illegible] There are many things which [illegible] cases that do not appear from [illegible] the demeanor of the respective witnesses, [illegible] and a great many other circumstances [illegible] better position in [illegible] of the matter in controversy than [illegible] v. [illegible], 232 Ill. App. 174, [illegible] Illinois 2d, [illegible] of the [illegible] more [illegible] verdicts over a testifying [illegible] of the witnesses are the weight [illegible] given such testimony."

[illegible] jury was [illegible] that made [illegible] Ill. 1d, [illegible] certain cases [illegible] asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean

the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury." All believers in the jury system must heartily approve this statement of our Supreme court. But we are not obliged to rely upon the rule laid down in the Hanisch case in order to sustain the verdict of the jury in the instant case, because, after a careful review of the evidence, we find ourselves in accord with the verdict of the jury.

The judgment of the Municipal Court of Chicago should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

43404



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| ELIZABETH MIRZA, Appellee, | ) | APPEAL FROM SUPERIOR COURT, |
| v. | ) | COOK COUNTY. |
| SAM MIRZA, Appellant. | ) | |

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant, Sam Mirza, appellant, appeals from a decretal judgment entered in the above cause.

Plaintiff, Elizabeth Mirza, appellee, filed the following "Complaint in Chancery:"

"Plaintiff, Elizabeth Mirza, complaining of the defendant, Sam Mirza, respectfully represents unto the court as follows:

"1. That she is the owner in fee simple absolute of the real estate legally described as follows: [here follows legal description] which said real estate is improved with a brick building commonly known as 1816 Lincoln Park West, Chicago, Illinois.

"2. That on November 28th, 1941, a decree of divorce was entered in favor of Sam Mirza, and against plaintiff, Elizabeth Mirza, in the case entitled Sam Mirza vs. Elizabeth Mirza, No. 41 S 3093, Superior Court of Cook County; and in and by said decree it was provided among other things that the bonds of matrimony theretofore existing between the plaintiff, Sam Mirza and the defendant, Elizabeth Mirza be dissolved, pursuant to the complaint of the plaintiff, Sam Mirza.

"3. That the complaint in said proceeding was predicated upon a supposed desertion committed by the defendant, Elizabeth Mirza against Sam Mirza, her husband, but in truth, and in fact, it was the defendant, Sam Mirza, who

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| ELIZABETH MIRES, Appellee, | APPEAL FROM DECREE |
| v. | |
| SAM MIRES, Appellant. | |

MR. JUSTICE [illegible] delivered the opinion of the court:

Defendant, Sam Mires, appellant, [illegible] from a decree of divorce rendered in the Superior Court of Cook County, entered upon a finding of the following "Conclusions of Law and Memorandum":

"Plaintiff, Elizabeth Mires, [illegible] complaining of the defendant, Sam Mires, [illegible] the court as follows:

"1. That [illegible] of the real estate [illegible] follows legal description: [illegible] improved with a frame [illegible] Lincoln Park [illegible], Illinois.

"2. That on [illegible] divorce was entered in favor of the [illegible] plaintiff, Elizabeth Mires, in the case entitled Elizabeth vs. Elizabeth Mires, No. [illegible] County, and in that by said decree it was provided among other things that the bonds of matrimony theretofore existing between the plaintiff, Sam Mires and the defendant, Elizabeth Mires be dissolved, pursuant to the complaint of the plaintiff, Sam Mires.

"3. That the complaint in said proceeding was predicated upon a supposed desertion committed by the defendant, Elizabeth Mires against Sam Mires, her husband, but in truth, and in fact, it was the defendant, Sam Mires, who

deserted and absented himself without cause from plaintiff, Elizabeth Mirza, for more than a period of one year.

"4. That Elizabeth Mirza had a proper defense to the action of divorce of said Sam Mirza, and had a counter-claim against him for having deserted her for more than one year without cause, but not being properly advised of her rights and for the sake of convenience she permitted the said Sam Mirza to obtain the decree aforementioned rather than prosecuting her counter-claim and obtaining the decree for and on her own behalf.

"5. That by reason of the entry of the aforementioned decree, the said Sam Mirza has obtained an inchoate dower interest against the real estate of plaintiff aforementioned and described, but said interest was obtained through fraud on the part of said Sam Mirza, and through the false testimony adduced by him at the divorce proceeding aforementioned.

"WHEREFORE plaintiff prays as follows:

"A. That a decree may be entered by this Honorable Court finding that the aforementioned divorce decree was obtained by the said Sam Mirza through no fault of the said Elizabeth Mirza, and that said real estate shall be free and clear of the inchoate dower interest of the said Sam Mirza.

"B. Or in the alternative that the court shall fix a reasonable value for the interest of the said Sam Mirza in said real estate, and that thereupon said real estate shall be free and clear of the interest of the said Sam Mirza."

Defendant filed the following answer to the complaint:

"1. That he admits the allegations set forth in paragraphs 1 and 2 of said complaint;

"2. That the divorce mentioned in said complaint

[illegible]

4. [illegible]

[illegible]

"[illegible]

"[illegible]

"[illegible]

"[illegible]

"[illegible]

"[illegible]

Defendant filed the following answer to the complaint:

"1. That he admits the allegations set forth in paragraphs 1 and 2 of said complaint;

"2. That the divorce mentioned in said complaint

was obtained on the grounds of desertion; that said decree has never been reversed or set aside and cannot be attacked in a proceeding of this kind;

"3. That the defendant, Sam Mirza, had a dower interest in said real estate at all times and that said dower interest was not obtained through fraud, but was obtained when said property was purchased by the parties to this lawsuit and that said dower was not obtained through the decree of court in the divorce matter;

"4. Further answering said complaint, the defendant states that the plaintiff ought not have the relief sought for the reason that it fails to set forth a good and meritorious cause of action and for the further reason that court is without jurisdiction to give the relief sought and for the further reason that there are not sufficient facts in said complaint on which to base a decree."

The following decree was entered in the cause:

"This matter coming on to be heard upon the complaint in chancery filed by Elizabeth Mirza, plaintiff herein, wherein she alleges that through mistake or fraud the defendant, Sam Mirza, acquired an inchoate dower interest in the following described real estate: [here follows description of real estate] and wherein she prayed that the court decree her title to be free from the estate or interest of the estate of Sam Mirza in said real estate,

"And it appearing to the court that the defendant, Sam Mirza, has been served personally by process and has appeared before the court through his appearance and answer by his attorney, Joseph Lustfield,

was obtained on the grounds of desertion; that said decree has never been reversed or set aside and cannot be attacked in a proceeding of this kind;

"3. That the defendant, Sam Mires, has a dower interest in said real estate at all times and that said dower interest was not obtained through fraud, but was obtained when said property was purchased by the petition to this lawsuit and that said dower was not obtained through the decree of court in the divorce matter;

"4. Further answering [illegible], the defendant states that the plaintiff ought not have the relief sought for the reason that he failed to use diligence and meritorious cause of action and for the further reason that court is without jurisdiction to give the relief sought and for the further reason that [illegible] sufficient facts in said complaint on which to base a decree."

The following decree was entered in the court:

"This matter coming on to be heard upon the complaint in chancery filed by Elizabeth Mires, plaintiff herein, wherein she alleges that through mistake or fraud the defendant, Sam Mires, received an interest to dower interest in the following described real estate: [illegible] following description of real estate] and wherein she prayed that the court decree her title to be free from the estate or interest of the estate of Sam Mires in said real estate,

"And it appearing to the court that the defendant, Sam Mires, has been served personally by process and has appeared before the court through his appearance and answer by his attorney, Joseph Instfield,

"And it further appearing to the court that the parties hereto have met before the court in an effort to determine the issues in a pre-trial conference and that at said pre-trial conference it was agreed by the defendant that he would be willing to accept the value of his inchoate dower in settlement of this proceeding, and at said pre-trial conference the said defendant further agreed that his interest in said real estate from an actuarial point of view amounted to $91.60 per thousand dollars of value of said real estate, and said defendant further agreed that he would be willing to abide by the valuation set by the appraisal committee of the Chicago Real Estate Board; and it appeared that plaintiff by her attorney stated that plaintiff was willing to abandon the fraud or mistake issues in her proceeding, and was willing to make the appraisal as indicated through the Chicago Real Estate Board,

"And it further appearing that said appraisal was ordered by said plaintiff and that the Chicago Real Estate Board by and through its Appraisal Committee appraised said real estate as having a value of $9,500.00, which said appraisal has been offered and received in evidence as plaintiff's Exhibit 1.

"It Is Therefore Ordered, Adjudged and Decreed by the court that the interest of the said Sam Mirza in the said real estate has a value of $870.30.

"It Is Further Ordered, Adjudged and Decreed by the court that upon the payment of said sum of $870.30 to the defendant Sam Mirza, he shall forthwith execute a quit-claim deed of his interest, in proper form, to the plaintiff, Elizabeth Mirza, or her nominee, for the sake and purpose of relinquishing his inchoate dower interest in said real estate.

The court hereby reserves jurisdiction for entering such other and further orders as may be necessary in the premises for effectuating the provisions of this decree."

"And it further appearing to the court that the parties hereto have met before the court in an effort to determine the issues in a pre-trial conference and that at said pre-trial conference it was agreed by the defendant that he would be willing to accept the value of his homestead lower in settlement of this proceeding, and at said pre-trial conference the said [illegible] further agreed that his interest in said real estate was an equitable point of view amounted to [illegible] thousand dollars or value of said real estate, and said [illegible] further agreed that he would be willing to allow [illegible] division set by the appraisal committee of the Cuyahoga Local [illegible] Board, and [illegible] plaintiff by her attorney [illegible] and [illegible] to abandon the fraud or misrepresentation [illegible], and was willing to make the appraisal [illegible] through the Cuyahoga Local Relief Board,

"And it further appearing that said [illegible] by said plaintiff and that the [illegible] through the appraisal committee appraisal and [illegible] having a value of $[illegible], which said [illegible] offered and was lower in [illegible] defendant.

"It is therefore ordered [illegible] by the court that the interest of the said [illegible] in the said [illegible] premises has a value of $[illegible].

"It is further ordered, adjudged and decreed by the court that upon the payment of said sum of $[illegible] to the defendant Sam Hines, he shall forthwith execute a quit-claim deed of his interest, in proper form, to the plaintiff, Mary-Beth Hines, or her nominee, for the sole and purpose of relinquishing his inchoate dower interest in said real estate.

The court hereby reserves jurisdiction for entering such other and further orders as may be necessary in the premises for effectuating the provisions of this decree."

The record contains what purports to be the following order, dated January 4, 1945. This "order" does not appear to have been signed by the chancellor:

"It Is Hereby Ordered that the Decree in the above entitled cause heretofore presented and signed on November 28, 1944, be amended by inserting the words 'Defendant' on the Fourth (4th), Sixth (6th) and Ninth (9th) lines of the Third (3rd) paragraph of said Decree the words 'by his attorney.'"

As no transcript of the proceedings was filed in the cause the findings in the decree stand unchallenged. About three weeks after the entry of the decree defendant filed a motion to vacate the decree "for the reason that said decree is contrary to the law in such case made and provided." The chancellor denied this motion.

We have before us a rather unusual situation. Upon a hearing before the chancellor the parties agreed upon the issues and the decree entered is in strict accordance with that agreement. We assume from the arguments of the parties that defendant, after the entry of the decree, became dissatisfied with the value of the property as fixed by the Chicago Real Estate Board and he now seeks to have the decree set aside upon the ground that the chancellor had not the power to divest the defendant of his inchoate right of dower. It is somewhat surprising that counsel for defendant, who represented the latter in the proceedings before the chancellor, should see fit to raise that contention in this court. However, it is only fair to him to say that when plaintiff, in her brief, called our attention to the record in the case, he did not file a reply brief, and that although he had asked for oral argument he waived it when the case was reached upon the oral argument call. The gist of defendant's argument in

The record contains what purports to be the following order, dated January 4, 1945. This "order" does not appear to have been signed by the chancellor:

"It Is Hereby Ordered that the decree in the above entitled cause heretofore presented and signed on November 28, 1944, be amended by inserting the words 'Volume III' on the sixth (4th), ninth (7th) and tenth (8th) lines of the third (3rd) paragraph of said decree, as the ends of the attorney."

As no transcript of the proceedings was filed in the cause the findings in the decree could not be disturbed. Last three words after the [illegible] defendant filed a motion to vacate the decree [illegible] in a [illegible] contrary to the [illegible] in such case [illegible] which defendant denied this motion.

[illegible] a hearing before the [illegible] upon the issues and the decree entered is in [illegible] with that agreement. [illegible] from the [illegible] that defendant, after the [illegible], [illegible] satisfied with the value of the property [illegible] by the Chicago Real Estate Board, [illegible] to have the decree set aside upon the ground that the chancellor had not the power to divest the defendant of his homestead right of [illegible]. It is somewhat surprising that counsel for [illegible], who represented the latter in the proceedings before the chancellor, should see fit to raise that contention in this court. However, it is only fair to him to say that when plaintiff, in her brief, called our attention to the record in the case, he did not file a reply brief, and that although he had asked for oral argument he waived it when the case was reached upon the oral argument call. The gist of defendant's argument in

this court is "that the court being without power to compel the defendant to relinquish his inchoate right of dower," "the decree * * * should be reversed." It may be conceded that the chancellor had no power to compel the defendant to convey his inchoate right of dower, but the defendant could voluntarily relinquish that right, and he did. (See Ratzman v. Ratzman, 333 Ill. 461, 468, cited by defendant.) Several other cases cited by defendant do not support the contention that the chancellor was without jurisdiction to enter the instant decree. In 28 C.J.S. Dower Sec. 65, p. 138, the author says: "It is as a general rule only by her own voluntary act in person that the right of dower may be relinquished. Thus, except as the rule has been changed by statute, the wife cannot be compelled by a court to execute a release, unless she has by voluntary contract bound herself so to do. However, she may of her own volition submit herself to the advice and direction of the court and consent to release her dower right in order to facilitate the proceedings and remove all embarrassments."

Counsel for defendant calls our attention to the alleged order of January 4, 1945, which, counsel contends, shows that the agreements of the parties recited in the decree were so far as defendant is concerned made by his attorney, and counsel seems to suggest, rather than contend, that agreements so made were not binding upon defendant. We question if this contention, if it be intended as a contention, is seriously made.

There is no merit in the instant appeal and the decretal judgment of the Superior court of Cook County is affirmed.

DECRETAL ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

this court is "that the court being [illegible] to compel the defendant to relinquish his inalienable right [illegible] "the decree [illegible] should be reversed." It may be conceded that the chancellor had no power to compel [illegible] to convey his interest [illegible] of the [illegible] voluntarily relinquish [illegible] v. Rutherford, 233 Ill. 461, [illegible] other [illegible] by contract to [illegible] that the chancellor [illegible] instant decree. In [illegible] author says: "It [illegible] voluntary act in person [illegible] relinquished. [illegible] by [illegible] exercise a reference, [illegible] bound herself to do. [illegible] submit herself to the advice [illegible] consent to [illegible] proceedings and remove all [illegible]."

Counsel for [illegible] of [illegible] the alleged order of [illegible] shows that the agreements of [illegible] were so far as defendant is concerned [illegible] and counsel seems to suggest, rather than contend, that agreements so made were not binding upon defendant. A question if this contention, if it be intended as a contention, is seriously made.

There is no merit in the instant appeal and the decree of judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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327 I.A. 335

NONA MABLE WHITE,
Petitioner, Plaintiff in Error,

v.

STEVE GOLLEAS and ANASTASIA GOLLEAS,
Respondents, Defendants in Error.

) ERROR TO COUNTY COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On July 1, 1943, a decree of adoption of an infant child was entered in the County court of Cook county. On May 12, 1944, Nona Mable White, petitioner, filed in that court a petition in the nature of a writ of error coram nobis in which she prayed that the decree of adoption be vacated and that the child be returned to her. In a hearing before Judge Jarecki evidence was introduced by the petitioner and the respondents, Steve Golleas and Anastasia Golleas. On December 21, 1944, the following judgment order was entered: "This day, again come the parties to this suit by their respective attorneys, and thereupon, the order of this Court, of November 28th, A. D. 1944 is hereby vacated and set aside. And thereupon the original motion to vacate the decree of adoption entered herein July 1, 1943 is hereby overruled and denied and it is further ordered that said decree of adoption shall remain in full force and effect." The petitioner then sought by writ of error to have the Supreme court review that judgment order upon the ground that Section 11 of the Adoption Act (ch. 4, par. 13, Ill. Rev. Stat. 1943) is unconstitutional and void to the extent that it denies to the natural parents a review of the adoption proceedings, but the Supreme court, in a short memorandum opinion, stated that there was no jurisdictional question involved, as Section 11 had been held valid, and an order was entered transferring the cause to this court.

NONA MARIE WHITE,
Petitioner, Plaintiff in Error,

v.

STEVE COLLEGS and ANASTASIA COLLEGS,
Respondents, Defendants in Error.

ERROR TO COUNTY COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On July 1, 1943, a decree of adoption of an infant child was entered in the County court of Cook county. On May 12, 1944, Nona Marie White, petitioner, filed in that court a petition in the nature of a writ of error coram nobis in which she prayed that the decree of adoption be vacated and that the child be returned to her. In a hearing before Judge Jarecki evidence was introduced by the petitioner and the respondents, Steve Colleos and Anastasia Colleos. On December 21, 1944, the following judgment order was entered:

"This day, again come the parties to this suit by their respective attorneys, and thereupon, the order of this Court, of November 21th, A. D. 1944 is hereby vacated and set aside. And thereupon the original motion to vacate the decree of adoption entered herein July 1, 1943 is hereby overruled and denied and it is further ordered that said decree of adoption shall remain in full force and effect." The petitioner then sought by writ of error to have the Supreme court review that judgment order upon the ground that Section 11 of the Adoption Act (ch. 4, par. 13, Ill. Rev. Stat. 1943) is unconstitutional and void to the extent that it denies to the natural parents a review of the adoption proceedings, but the Supreme court, in a short memorandum opinion, stated that there was no jurisdictional question involved, as Section 11 had been held valid, and an order was entered transferring the cause to this court.

Respondents have filed a motion that the instant writ of error be dismissed upon the ground that the petitioner has no right to a review of the adoption order entered by the County court either by appeal or writ of error, and Ekendahl v. Svolos, 388 Ill. 412, is cited in support of their motion. That case holds (p. 415) that "There is nothing in the nature of the right which natural parents have in their children and to their custody that will support a review of an adoption proceeding by writ of error." The petitioner contends, however, that she does not seek by her petition to review the adoption proceeding; that her petition is in the nature of a writ of error coram nobis; that it constitutes a new suit and that a judgment entered in such a proceeding is reviewable, citing People v. Dabbs, 372 Ill. 160, 165; Central Bond Co. v. Roeser, 323 Ill. 90, 94; Jacobson v. Ashkinaze, 337 Ill. 141, 147; Mitchell v. King, 187 Ill. 452, 458, and other cases. To this contention respondents respond that in its essentials Section 72 of the Civil Practice Act (ch. 110, par. 196, Ill. Rev. Stat. 1945) remains the same as the old common law writ of error coram nobis; that the old writ was solely a common law writ arising in connection with trials in the courts of King's Bench in England and that Section 72 cannot be made to correct any errors of fact there may be in purely statutory proceedings like the Adoption Act. In support of this contention respondents cite Bishop v. Illinois Western Electric Co., 221 Ill. App. 141; Reid v. Chicago Rys. Co., 231 Ill. App. 58, 65; People v. Janssen, 263 Ill. App. 101; Mitchell v. King, supra, p. 457. However, in view of our opinion as to the merits of the error coram nobis proceeding, we have concluded to assume, solely for the purposes of this case, that petitioner had the right to sue out a writ of error from the judgment entered

Respondents have filed a motion that the instant writ of error be dismissed upon the ground that the petitioner has no right to a review of the adoption order entered by the county court either by appeal or writ of error, and Hopkins v. [illegible], [illegible] Ill. [illegible], is cited in support of their motion. That case holds (p. [illegible]) that "[illegible] the nature of the right which natural parents have in their children [illegible] to their custody that [illegible] review of an adoption proceeding by writ of error." [illegible], however, that the [illegible] adoption proceeding [illegible] a writ of error [illegible] and that a judgment entered in such a proceeding [illegible], citing [illegible] v. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible], and other cases. To this contention respondents reply [illegible] Section 72 of the Civil Practice Act ([illegible]), [illegible] Nov. [illegible], [illegible] writs of error coram nobis; that the [illegible] solely [illegible] law writ [illegible] in connection [illegible] in the courts of [illegible] in Illinois and [illegible] cannot be used to correct any errors of [illegible] that may be in purely statutory proceedings like the Adoption Act. In support of this contention respondents cite [illegible] v. Illinois [illegible] Co., [illegible] Ill. App. 141; Hold v. Chicago [illegible] Co., [illegible] Ill. App. [illegible]; People v. [illegible], [illegible] Ill. App. 10[illegible]; [illegible] v. [illegible], supra, p. 457. However, in view of our opinion as to the merits of the error coram nobis proceeding, we have concluded to assume, solely for the purposes of this case, that petitioner had the right to sue out a writ of error from the judgment entered

upon her petition, and the motion of respondents to dismiss the writ of error is denied.

The petition in the instant cause alleges, inter alia, that about April 16, 1943, petitioner, in Chicago, gave birth to a daughter, out of wedlock; that the child was registered under the name of Janice Carol Demoplos; that James C. Demoplos is the father of the child; that about April 26, 1943, petitioner went to reside at 3459 West Jackson boulevard and resided there with the child until June 13, 1943; that on that date she was ill, weak and confined in bed; that Demoplos entered her home "and unlawfully and forcibly took said infant child from said petitioner, without the consent of your petitioner, and since said date aforesaid, the said James C. Demoplos has unlawfully kept away from your petitioner and out of her care and custody said infant child, contrary to law"; that at the time Demoplos took the child from petitioner he had her sign a certain paper which was not exhibited to her "but by force, violence and threat, the said James C. Demoplos forced this petitioner to sign said paper, contrary to her will and desire"; that on numerous occasions she demanded her child from Demoplos and on his refusal to bring back the child or tell her where the child was kept she, about April 28, 1944, filed in the Superior court of Cook county a writ of habeas corpus, wherein Demoplos was made a defendant; that the purpose of said writ was to obtain the return of her child and that at the hearing upon the writ she first ascertained that there had been adoption proceedings and that her child had been adopted by respondents; that she had no notice nor knowledge of said proceedings; that she had never heard of Steve Galleas and Anastasia Galleas until the hearing upon the habeas corpus

upon her petition, and the motion of respondents to dismiss the writ of error is denied.

The petition in the instant cause alleges, inter alia, that about April 16, 1942, petitioner, in Ohio, gave birth to a daughter, out of wedlock; that the child was registered under the name of Maria Lucia Demopolos; that Jerea C. Demopolos is the father of the child; that about April 26, 1942, petitioner went to Mexico [illegible] and taken Boulevard and resided there with the child until June 16, 1942; that on that date she was ill, weak and confined in bed; that Demopolos entered her home "and unlawfully and forcibly took and did remove said petitioner, without the consent of your petitioner, and since said date aforesaid, the said Jerea C. Demopolos has unlawfully kept away from your petitioner the care of her care and custody said infant child, contrary to law; that at the time Demopolos took the child from petitioner he had her sign a certain paper which was not exhibited to her "but by force, violence and threat, the said Jerea C. Demopolos forced this petitioner to sign said paper, contrary to her will and desire"; that on numerous occasions she demanded her child from Demopolos and on his refusal to bring back the child or tell her where the child was kept she, about April 16, 1942, filed in the Superior court of Cook county a writ of habeas corpus, wherein Demopolos was made a defendant; that the purpose of said writ was to obtain the return of her child and that at the hearing upon the writ she first ascertained that there had been adoption proceedings and that her child had been adopted by respondents; that she had no notice nor knowledge of said proceedings; that she had never heard of Steve Galiosa and Anastasia Galiosa until the hearing upon the habeas corpus

petition; that she never intended to have her child adopted by them nor by anyone; that she never consented to any adoption proceedings and that the consent which appears in the adoption proceedings was obtained from her by fraud and duress and without her knowledge; that the verified petition filed by Steve Galleas and Anastasia Galleas, his wife, for the adoption of petitioner's daughter is false and untrue in that they aver that "the cause of the adoption is that the mother is unable to maintain said child and has abandoned and surrendered said child to these petitioners, Steve Galleas and Anastasia Galleas, and that she waived summons and consents in writing to the adoption of said child"; that the foregoing is untrue because she has always been able to support and maintain her child and that she never abandoned or surrendered the child to Steve Galleas and Anastasia Galleas, or to anyone else; that she never waived summons in the adoption proceedings and never consented to the adoption of her daughter, and that the petition for adoption is also false in that her address is given as 1915 West Madison street, Chicago, when as a matter of fact she never resided at that address, and that her address is 3459 West Jackson boulevard; that at the time she was forced by Demoplos to sign said slip of paper there was no one present, and she was not permitted to see the paper, "but was forced to sign on a line, with all of the contents of said paper being covered and at the time of the signing of said paper, the said James C. Demoplos held her by the neck and shoulders and threatened her life"; that at no time did Demoplos tell her that the child was going to be adopted, but on the contrary stated to her that he was going to place the child in a nursery for a period of one or two weeks, until she, peti-

petition; that she never intended to have her child adopted by them nor by anyone; that she never consented to any adoption proceedings and that the consent which appears in the adoption proceedings was obtained from her by fraud and duress and without her knowledge; that the verified petition filed by above [illegible] and [illegible], his wife, for the adoption of petitioner's daughter is false and untrue in that they aver that the consent of the mother [illegible] that the mother is unable to maintain and [illegible] has abandoned and surrendered said child to the petitioners, [illegible] and the facts [illegible] and con-sents in writing to the adoption of [illegible]; that the foregoing is untrue [illegible] is able to support and maintain her child and that she never abandoned or surrendered the child to [illegible] Dallas, or to anyone else; that she never [illegible] consent in the adoption proceedings and never [illegible] the adoption of her daughter, and that the petition for adoption is also false in that it [illegible] East Madison street, [illegible] that she never resided at that address, [illegible] Dawson boulevard; that at the time she [illegible] Demoplos to sign said slip of paper there was no [illegible], and she was not permitted to see the paper, "that she was forced to sign on a line, with all of the contents of said paper being covered and at the time of the signing of said paper, the said James C. Demoplos held her by the neck and shoulders and threatened her life"; that at no time did Demoplos tell her that the child was going to be adopted, but on the contrary stated to her that he was going to place the child in a nursery for a period of one or two weeks, until she, peti-

tioner, was strong enough to be on her feet, and that said child would be returned to her at the end of that period of time; "Wherefore, your petitioner prays that the decree of adoption entered * * * on July 1, 1943, be set aside and held for naught, and that said child, Janice Carol Demoplos, be returned to this petitioner." The petition was signed and verified by the petitioner. The record in the adoption proceedings contains the following:

"STATE OF ILLINOIS, )
"COOK COUNTY. ) SS.

"In the matter of the petition of )
STEVE GOLLEAS and TOBY GOLLEAS )
to adopt ) I, Nona Mabel White Demoplos
JANICE CAROL DEMOPLOS )

of Chicago in the County of Cook and State of Illinois, Mother of Janice Carol a minor child hereby enter my appearance, waive issue of process, and consent to an immediate hearing of above cause and to the adoption of said minor child by Steve Golleas and Toby Golleas in manner and form as provided by an Act of the General Assembly of the State of Illinois, approved May 25, A. D. 1907.

"Dated this _____ day of June 1943.

"Nona Mabel White Demoplos

"Witness to Signature

"James Kyriazis"

The decree entered in the adoption proceedings finds, inter alia:

"The Court Further Finds that the cause for the adoption of the said child is that the mother, Nona Mabel White Demoplos, who is the sole surviving parent of said child, and of legal age, is unable to properly maintain the said child and has abandoned and surrendered the said child to the petitioners and the said mother consents in writing to the adoption of her said child by the petitioners herein."

tioner, was strong enough to be on her feet, and that said child would be returned to her at the end of that period of time; "Therefore, your petitioner prays that the decree of adoption entered * * * on July 1, 1943, be set aside and held for naught, and that said child, Janice Carol Thompson, be returned to this petitioner." The petition was signed and verified by the petitioner. The record in the adoption proceedings contains the following:

"STATE OF ILLINOIS, )
"COOK COUNTY. ) SS.

"In the matter of the petition of
STEVE COLLINS and TONY COLLINS )
to adopt )
JANICE CAROL [illegible] )

—, Mona Ethel Hite Demoplos of Chicago in the County of Cook and State of Illinois, Mother of Janice Carol, a minor child, hereby enter my appearance, waive issue of process, and consent to an immediate hearing of above cause and to the adoption of said minor child by Steve Collins and Tony Collins in manner and form as provided by an Act of the General Assembly of the State of Illinois, approved May 25, A. D. 1907.

"Dated this ______ day of June 1943.

"Mona Ethel Hite Demoplos

" Witness to signature

"James [illegible]"

The decree entered in the adoption proceedings finds, inter alia:

"The Court further finds that the cause for the adoption of the said child is that the mother, Mona Ethel Hite Demoplos, who is the sole surviving parent of said child, and of legal age, is unable to properly maintain the said child and has abandoned and surrendered the said child to the petitioners and the said mother consents in writing to the adoption of her said child by the petitioners herein."

The error of fact relied upon by petitioner relates to the consent in writing to the adoption that was signed by her and filed in the adoption proceedings and presented to the court upon the hearing. It is conceded in the instant proceeding that petitioner and Demoplos had been keeping company for two years prior to June 13, 1943, and that they were intimate during all of that period and for some time after June 13, 1943. Petitioner testified that she was very much in love with Demoplos during all of that time and even after he had taken her baby away. Petitioner and Demoplos testified that he was the father of the child. She testified that on Sunday, June 13, 1943, about 5:30 o'clock, Demoplos came to her two room apartment, pulled out a paper, and said, "I know you are going to sign this"; that she said, "No, I am not"; that she asked him if she could read the paper and he said, "No"; that she then refused to sign the paper; that he grabbed her by the shoulder and nape of the neck and said, "You are going to sign it"; that, "being sick and having to take care of my baby without help, I was afraid of him and I pleaded with him for help, but he still shook me and said 'you will sign it,' and all the time I was crying and finally, I had to give up, because of my weakness and signed the paper. I did not see what kind of paper it was. He had it covered"; that no one was present in the room besides Demoplos and herself. She identified her signature upon the "consent to adoption" paper that was filed in the adoption proceedings. She further testified that she was crying and did not want to give up her baby; that Demoplos grabbed hold of her and ordered her to get the baby ready, and he started picking up things around there "for the baby to go"; that she did not want to get the baby ready; that she asked him

but he did not tell her where he was taking the baby; that he left with the baby; that after that evening she saw Demoplos a few times and begged and pleaded for the baby; that she continually asked him where the baby was, but that he never told her that he was going to have the baby adopted; that she did not know Steve Galleas and Anastasia Galleas and xxx had never seen them; that the first time she knew that her child was adopted was when she and her lawyer went before Judge Lewe on May 3 in a habeas corpus proceeding. Upon cross-examination she testified that on the evening of June 13 she wrote a milk formula for the child; that she did not know how long it took her to prepare the formula because she was upset and crying. Petitioner was again called to the stand by her counsel and testified that Demoplos took away from her apartment the written formula (respondents' Exhibit 1) about the food for the baby but that she did not give it to him; that at the time he took the baby she had the milk ready in the bottles; that he also took the baby's clothes and even packed wet clothes that she had just washed; that he was at her place that evening about an hour or two; that she fed the child in his presence; that the next day she was ready to move and she finally called Demoplos up and asked him to help her in moving, and he did so; that she continually asked Demoplos to return her baby; that after Demoplos took her baby away she saw him a number of times; that Demoplos never came to see her save at night; that after Demoplos took her baby away she met him on the street four or five times but that she never went out with him after he took the baby. Demoplos testified and denied all the statements of petitioner to the effect that he used force upon her and compelled her to sign the consent to the adoption paper, and that he took away the baby by force and intimidation. He further testified that he continued

but he did not tell her where he was taking the baby; that he left with the baby; that after that evening, she saw Xenopolos a few times and begged and pleaded for the baby; that she continually asked him where she could see it; that he never told her that he was going to have the baby adopted; that she did not know; that he did [illegible] and had a very short time; that he knew that her child was adopted when [illegible] before June [illegible]. Upon cross-examination she testified that on the evening of June 1[illegible] she [illegible] for the child; that she did not [illegible] the formula because she [illegible] and [illegible]. Petitioner was again called to the stand by the [illegible] and testified that Xenopolos took away from her [illegible] the Nestlen formula (respondents' Exhibit 1) which he had for the baby but that she did not give it to him; that she also took the baby; she had the milk ready in the bottles; that he also took the baby's clothes and [illegible] that he had left; that he [illegible] two; that she had [illegible] that the next day she was ready to leave and [illegible] Xenopolos up and asked him to help her in [illegible]; and he [illegible] that she continually asked Xenopolos to [illegible] after Xenopolos took her baby away she saw him a number of times; that Xenopolos never came to see her save at [illegible] that after Xenopolos took her baby away she went with him on the street four or five times but that she never went out with him after he took the baby. Xenopolos testified and denied all the statements of petitioner to the effect that he used force upon her and compelled her to sign the consent to the adoption paper, and that he took away the baby by force and intimidation. He further testified that he continued

to see petitioner at her home about twice a week until the baby was adopted; that in the first conversation he had with her after the baby was born she said that she could not take care of the baby, that she did not wanted her folks to know that she had a baby, and that they both decided that the baby should be adopted; that he told her Mr. Golleas wanted to adopt the baby and that she said she was willing to give up the baby; that on the evening when he took the baby away she signed the consent to adoption willingly and she prepared the baby's belongings and put them into a suit case and shopping bag; that she got all the baby's stuff out; that he was at the house about an hour and a half before he took the baby; that he did not use any violence upon her nor did he command her to sign the paper; that after he took the baby to Mrs. Golleas he took the suit case back to petitioner the same night and that he then stayed with petitioner about an hour; that she asked him where he took the child and he told her. The witness then identified certain exhibits that were afterward offered by respondents. He further testified that he continued to see petitioner until February 24, 1944, when he was served with papers in the instant proceeding; that petitioner continued to ask him to see her oftener than he did and that he told her he could not, and that she then threatened to take him into court about the baby; that after the child was adopted he saw petitioner about twice a week or more. Steve Golleas testified that he had known petitioner since 1941; that he met her first in Peoria, Illinois; that when Demoplos told him he wanted to have the baby adopted by a party that was quite well off he told Demoplos that it would be better to have the consent of Miss White; that the latter told him that she wanted to have her baby adopted

to see petitioner at her home about twice a week until the baby was adopted; that in one "last conversation he had with her after the baby was born she said she could not take care of the baby, that she did not want her folks to know that she had a baby, and that they didn't decide that the baby should be adopted; that he told her Mr. Collins wanted to adopt the baby and that he said he was willing to give up the baby; that on the evening [illegible] the baby away she signed the consent to adoption which Mr. Collins prepared; the baby's belongings and not much else [illegible] shopping bag; that she told Mr. Collins [illegible] that he was at the house about an hour and [illegible] before he took the baby; that he did not see any [illegible] he command her to do in the pantry; that after [illegible] the baby to live, Collins [illegible] took the [illegible] the same night and that he then stayed [illegible] about an hour; that she asked him where he took the child [illegible] he told her. The witness then filed [illegible] that were afterward offered by respondents. [illegible] he continued to see petitioner until [illegible], when he was served with papers in the instant [illegible] that petitioner continued to ask him to [illegible] her father when he did and that he told her he could not, and that he then threatened to take him into court about the baby; that after the child was adopted he saw petitioner about twice a week or more. Steve Collins testified that he had known petitioner since 1941; that he met her first in Seattle, Illinois; that when Demoplos told him he wanted to have the baby adopted by a party that was quite well off he told Demoplos that it would be better to have the consent of Miss Whitey; that the latter told him that she wanted to have her baby adopted

because she was unable to take care of it and that she did not want anybody to know about the baby; that he told Miss White that if somebody else did not take the child he would take it; that she said, "I like to have it adopted, it is all right"; that she was anxious to have the baby adopted; that he was at his home about 7 o'clock in the evening when Demopoulos came with the child, a suit case and a shopping bag; that the child was clothed; that in the suit case and shopping bag were "blankets and everything"; that the baby's belongings and also a couple of pictures of the child were in the suit case; that in the shopping bag there was a bundle of wet clothes; that his wife and sister unpacked the bag and Demopoulos handed the child to the witness's wife; that in the suit case there was the letter (respondents' Exhibit 1), some pictures, three or four blankets, diapers and different things like that, and about six bottles of milk; that when he was in the home of Miss White a week before the child was adopted the baby was sleeping in the suit case; that petitioner told him she wanted to give the baby away and that she was unable to support it; that when the baby was brought to his home by Demopoulos it had a birth certificate on it.

Petitioner testified that three days after Demoplos took the child away from her she mailed to him the following letter:

"Lincoln, Ill.
"June 16, 1943

"My Dearest Darling Jimmy

"Sweetheart, I expect you are surprised upon receiving a letter from me here but I decided all of a sudden to come to Lincoln and see about my things even after I called the store Tues. afternoon and Friday morning I'm going to Peoria and will be in Chicago some time Sat. I've had a terrible

because she was unable to take care of it and that she did not want anybody to know about the baby; that he told Miss White that if somebody else did not take the child he would take it; that she said, "I like to have it adopted, it is all right"; that she was anxious to have the baby adopted; that he was at his home about 7 o'clock in the evening when Demopoulos came with the child, a suit c se and a shopping bag; that the child was clothed; that in the suit case and shopping bag were "Mam ets and everything"; that the baby's belongings and also a bundle of pictures of the child were in the suit case; that in the shopping bag there was a bundle of wet clothes; that his wife and sister prepared the bag and Demopoulos handed the child to the witness's wife; that in the suit case there was the letter (respondent's exhibit 1), some pictures, three or four diapers, diapers and different things like that, and about six bottles of milk; that when he was in the home of Miss White a week before the child was adopted the baby was sleeping in the suit case; that petitioner told him she wanted to give the baby away and that she was unable to support it; that when the baby was brought to his home by Demopoulos it had a birth certificate on it.

Petitioner testified that three days after Demopolos took the child away from her she mailed to him the following letter:

"Lincoln, Ill.
"June 16, 1943

"My Dearest Darling Jimmy

"Sweetheart, I expect you are surprised upon receiving a letter from me here but I decided all of a sudden to come to Lincoln and see about my things even after I called the store Tues. afternoon and Friday morning I'm going to Peoria and will be in Chicago some time Sat. I've had a terrible

time with my things but I think I have the matter settled until I want them now thank heavens.

"Dearest do you know what today is. Our little girl is two months old today. Sweetheart I haven't broken down yet and if I get through this week without breaking down I think I'll have the thing pretty well conquered. I'm doing this in an attempt to make you happier and myself to.

"I know I was terrible Monday nite but let's forget it and I'll try my best to be half way satisfied and happy for my darling.

"Sweetheart I'll call you Saturday as I'll try and get there before 2 o'clock. I can't wait to get back to Chicago and to be in my darlings arms and always be near you. I love you more & more. I couldn't leave being near you and with you for anything in fact I'm ready to come back right now.

"Always your
"Loving
"Nona"

She further testified that she mailed to Demoplos the following letter:

"My Dearly beloved Jimmy:

"Darling, I can never tell you how much I missed you Sunday night. I waited until 2:30 and then I couldn't sleep for wondering what happen to you. I finally cried myself to sleep about 4:30 Dearest I hope I haven't done anything to make you treat me badly. If I have please forgive me. Jimmy Please come tuesday night Darling I don't mean to hound you but you are very very dear to me and I know beyond a doubt if you ever stop seeing me or caring for me what little you do. It is the end.

"Sweetheart three months ago you ask me to prove my love for you by giving up our little girl I did because I

time with my things but I think I have the matter settled until I want them now though <u>because</u>.

"Dearest do you know what today is. Our little girl is two months old today. Sweetheart I haven't broken down yet and if I get through this week without breaking down I think I'll have the thing pretty well conquered. I'm doing this in an attempt to make you happier and proud of me.

"I know I was a terrible coward in the box I didn't forget it and I'll try my best to be not only worthier and happy for my darling.

"Sweetheart I'll call you tomorrow night and get there before 2 o'clock. I can't wait to get to Chicago and to be in my darlings arms and know you love me. I love you more & more. I couldn't leave you. [illegible] you for anything in fact I'm ready to [illegible] right now.

Always your
Loving
[illegible]

His mother wrote the following to accompany the following letter:

"My dearly beloved Jimmy:

"Darling, I can never [illegible] you. [illegible] Sunday night. I waited until 8:30 and then I took a sleep for wondering what happen to you. I finally came upstairs to sleep about 4:30 Dearest I hope I haven't done anything to make you treat me badly. If I have please forgive me. Jimmy please come Tuesday night Darling I don't mean to hound you but you are very very dear to me and I want a young a lamb if you ever stop seeing me or caring for me that little you do. It is the end.

"Sweetheart three months ago you ask me to prove my love for you by giving up our little girl I did because I

really and truly love you. But that doesn't seem to be enough for you What do you want me to do next? You know all you have to do is tell me and I try so hard to please you but I don't seem to get much consideration from you but because I care so much for you I'm willing to wait if it is forever.

"Please my darling sweetheart come tuesday night, Honey I know I said some things last time that hurt you. Forget them You know as well as I that I can't live without you.

"If you come I try with all thats in me to let you go early. Please, dear,

"Always yours,

"Nona I love you"

The following writing (respondents' Exhibit 1) was in the suit case with the baby's clothes at the time the baby was taken away:

"Baby Janice Carol

"Formula

"24 oz. Homogenized milk
12 oz. Water
4 Tablespoons Dextri Maltose No. 1

"Boil water 5 minutes add Maltose and then the milk Put into bottles Devide into six feedings 6 oz. each. Feedings 6 A.M. - 10 A.M. - 2 P M - 6 P.M. - 10 P. M. and 2 A. M if she wakens.

"Water

"Boil 8 oz. of water 5 min and cool give at 12 and 8 & 5 warm before giving or an hour before any feeding

"Orange juice

"Pure juice - 1 oz. warm - at 4 P.M. or 8 A. M.

really and truly love you. But that doesn't seem to be enough for you. What do you want me to do mostly. You know all you have to do is tell me and I try so hard to please you but I don't seem to get much consideration from you but because I care so much for you I'm willing to wait if it is forever.

"Please my darling sweetheart come to-day might, Honey I know I said some things last night but I love you. Forget them You know as well as I that I can't live without you.

"If you come I try with all that in me to let you go early. Please, dear,

"Always yours,

"Mona I love you"

The following writing (responsibility unknown) was in the suit case with the baby's clothes at the time the baby was taken away:

"Baby Fance Cereal

"Formula

"24 oz. Homogenized milk
12 oz. Water
4 Tablespoons Dextri Maltose No. 1

"Boil water 5 minutes add Maltose mix then the milk. Put into bottles. Divide into six feedings 6 oz. each. Feedings 6 A.M. - 10 A.M. - 2 P.M. - 6 P.M. - 10 P.M. and 2 A.M. if she wakens.

"Water

"Boil 8 oz. of water 5 min and cool give at 12 and 8 & 5 warm before giving or an hour before any feeding

"Orange Juice

"Pure juice - 1 oz. warm - at 4 P.M. or 8 A.M.

"Give before ( Give 15 drops of
juice ( Mead's Oleum Percomorphum
( 50%
( with Viosterol 10 c. c.

"Bathe before 10 or 2 o'clock feedings

"Z. B. T. Baby Powder is the best because it doesn't cake and is also made with oil which is soothing to the skin

"Boric Acid ointment is for her little bottom if she breaks out or gets diaper rash.

"Don't use oil on her as it makes her break out.

"If she becomes constipated give one teaspoon of Phillips Milk of Magnesia in her 6 o'clock morning bottle or put it in all of her formula

"When she starts sleeping through 2 A. M. feeding make 5 feedings of 7 oz. each every 4 hours.

"Boric acid solution for eyes.

"1 Tablespoon Boric Crystals to 1 pint of boiling water let cool before using

[a] "You see I love my little girl but thing are against me so I am forced to give her up. Give her all the love you can and take good care of her.

"She was born Friday morning a few minutes after seven April 16/43 weighed 5 lbs. and 7 oz. on bringing her home she weighed 5 lbs 11 oz. at 5 weeks of age she weighed 7 lbs 4 oz. and was 19 1/2 inches long.

"I've enclosed one of her first Pictures taken when she was 5 wks old.

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"to-night if she wakens at twelve or after give her the bottle with the nipple on it.

"Then morning start at 6 oclock and feed every 4 hrs.

"There are two things I ask you to do as my little girl <u>now yours</u> grows up. (Italics ours.)

"Give before feeding { Give 1½ drops of Mead's Gluten Homogenized with Vitamins 10 c. c.

"Nothing before 10 or 2 o'clock feedings

"A. B. C. Baby Powder is the best because it [illegible] and is also made with cod liver oil which is according to the [illegible] "Horlick malted nutrament is [illegible] It also has [illegible] out or gets thinner [illegible]

"Don't use oil on her [illegible]

"If she becomes constipated give her [illegible] milk of magnesia in her [illegible] in all of her formula

"Then she gets the [illegible] feedings of 7 oz. each every [illegible]

"Boric acid solution for eye.

"I think your Horlick [illegible] water let cool before using

"Now see I love you [illegible] regret to [illegible] love you can [illegible]

"Take your [illegible] seven April 18th weighed [illegible] and 7 oz. [illegible] home she weighed 7 lbs 12 oz. [illegible] 7 lbs 4 oz. and was 19 1/2 inches long.

"I've enclosed one of her first photos taken when she was 3 wks old.

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"To-night if she wakens at twelve or after give her the bottle with the nipple on it.

"Then morning start at 6 o'clock and feed every 4 hrs.

"There are two things I ask you to do as my little girl now young grows up. (Italics ours.)

"When she comes to you with her problems, to a child they are big but to you they may seem small, but always, regardles what you are doing stop. talk things over with her and give her the best advice you know. Never tell her she knows as well as you to decide herself because you then loose their confidence; then she wont bring them to you.

"When it comes time for her to know facts of life be sure you tell her, please don't let her have to find out about these things herself, tell her the straight truth in a gentle motherly way."

Petitioner testified that she wrote the formula part of the above exhibit but that she did not remember writing the part of it that we have designated as [a]; she admitted, however, that the handwriting of the part in question "looks like mine." Petitioner's handwriting is excellent. We have carefully compared the part of the exhibit designated as [a] with her admitted writings and we are satisfied that she wrote the part designated as [a].

Pity for the petitioner, contempt for Demoplos, cannot change the evidence in the case, which shows conclusively that Demoplos did not forcibly take the child from petitioner, but that, on the contrary, she voluntarily gave up the child, and consented to its adoption. It must be remembered that Demoplos is not the respondent in this case, and that the respondents acquired certain rights to the child through the adoption decree that cannot be arbitrarily taken away from them.

The judgment order of the County court of Cook county is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

"Now she comes to you with her problems, as a child they are big but to you they may seem small, but she, regardless what you are doing *else*, talks things over with you and give her the best advice you know. Never tell her she knows as well as you to "stick" because if you lose their confidence, then she won't bring them to you.

"When it comes time for her to know the ABC of life be sure you tell her, please don't let her learn to find out about these things "recall", tell her the absolutely truth in a gentle motherly way."

Petitioner's brief, such as it is, cites his foremost part of the above authority but that he did not remember writing the part of it that we have underlined, he does admitted, however, that the information in question "looks like mine." Petitioner's counsel, in his counsel, he has carefully compared the part of the original document as [illegible] with the above and we are satisfied that it is not much to tip the scales.

Pity for the petitioner, and sympathy for children, cannot change the evidence in the case, which shows conclusively that Georgiea did not voluntarily take the child from petitioner, but that, on the contrary, she voluntarily gave up the child, and consented to its adoption. It must be remembered that Georgiea is not the respondent in this case, and that the respondents acquired certain rights to the child through the adoption decree that cannot be arbitrarily taken away from them.

The judgment order of the County court of Cook county is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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| ANNA (sometimes known as ONA) CLARK, Appellee, v. LITHUANIAN ROMAN CATHOLIC ALLIANCE OF AMERICA, Appellant. | APPEAL FROM CIRCUIT COURT, COOK COUNTY. |

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Anna (sometimes known as Ona) Clark, to recover $1,000, which was the face value of an insurance certificate issued to her father by the defendant, Lithuanian Roman Catholic Alliance of America. After the pleadings had been filed plaintiff as beneficiary under the insurance certificate filed a motion for summary judgment accompanied by supporting affidavits and defendant filed counter affidavits. Plaintiff's motion for summary judgment was allowed and judgment was entered against defendant for $1166.66, which included interest amounting to $166.66. Defendant appeals.

Plaintiff's complaint alleged in substance the issuance of the certificate of insurance by the defendant to her father, Joseph Shimkus, the terms of said certificate, the payment of the assessments due thereon during his lifetime, the death of the assured, the furnishing of proper proofs of his death to defendant and that she was the beneficiary named in said certificate of insurance.

The material averments of defendant's answer were that the assured was not in good standing at the time of his death, being at that time more than six months in arrears in the payment of his monthly dues; that under certain self-executing provisions of defendant's by-laws and constitution the assured had been ipso facto suspended

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| ANNA (sometimes known as ONA) SHARK, Appellee, | APPEAL FROM CIRCUIT |
| v. | COURT, COOK COUNTY. |
| LITHUANIAN ROMAN CATHOLIC ALLIANCE OF AMERICA, Appellant. | |

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT:

This action was brought by plaintiff, Anna (sometimes known as Ona) Shark, to recover $1,000, which was the face value of an insurance certificate issued to her father by the defendant, Lithuanian Roman Catholic Alliance of America, after the pledge had been filed plaintiff as beneficiary under the insurance certificate filed a motion for summary judgment accompanied by affidavits of plaintiff and defendant filed counter affidavits. Plaintiff's motion for summary judgment was allowed and judgment was entered against defendant for $1,000.00, which included interest amounting to $106.30. Defendant appeals.

Plaintiff's complaint alleged in substance the issuance of the certificate of insurance by the defendant to her father, Joseph Shakna, the terms of said certificate, the payment of the assessments due thereon during his lifetime, the death of the insured, the furnishing of proper proofs of his death to defendant and that she was the beneficiary named in said certificate of insurance.

The material averments of defendant's answer were that the insured was not in good standing at the time of his death, being at that time more than six months in arrears in the payment of his monthly dues; that under certain self-executing provisions of defendant's by-laws and constitution the insured had been ipso facto suspended

prior to the time of his death for said default in the payment of his monthly dues, whereby his insurance certificate had lapsed and plaintiff as his beneficiary had no further rights thereunder; and that plaintiff cannot maintain her claim because she failed to furnish defendant with "Proofs of Death" of the decedent as required by the terms of said insurance certificate.

The substance of plaintiff's affidavit filed in support of her motion for summary judgment is that on or about March 12, 1917, the defendant issued its membership insurance certificate to her father, Joseph Shimkus; that her father thereby was admitted to beneficiary membership in the defendant organization and became entitled to all the rights, benefits and privileges of membership therein, according to the provisions of said membership certificate and the constitution and by-laws of the Lithuanian Roman Catholic Alliance of America; that her father died on or about August 24, 1941; that on or about August 30, 1941 she notified defendant's local secretary in Chicago of the death of her father and that defendant was informed of and knew of his death; that although plaintiff has demanded payment of the sum of $1,000 due her as beneficiary under said insurance certificate, defendant has refused to pay her said sum or any part thereof; and that Article 23 of the constitution and by-laws of the defendant organization provides in part as follows:

"Paragraph 1. At the regular lodge meeting, the Financial Secretary shall prepare and read a list of delinquent members.

"Paragraph 2. If any monthly or other dues, fines or assessments levied against Member are not paid on or before the date due, the Certificate will be in default; but a grace period of three (3) months will be allowed for any payment after the first, during which time the Certificate will continue in force. If death occurs within the period of grace, the overdue payments shall be deducted from the amount of death benefit payable hereunder. Should the Member fail to pay the amounts due at the expiration of

the period of grace, he shall forthwith be expelled and he and his beneficiaries shall forfeit entirely and conclusively all rights and claims and all money paid into the Alliance ***."

A copy of the insurance certificate as well as a statement of "Joseph Shimkus' Record of Payments Received at Home Office" were attached to and made part of plaintiff's affidavit. Said record of payments showing the manner in which Shimkus' monthly dues were paid by him and accepted by defendant during the seven years prior to his death is as follows:

"JUOZAS SHIMKUS' RECORD OF PAYMENT
RECEIVED AT HOME OFFICE

Became a member on March 12, 1917

| Month and Year Paid | | Number of Months | Paid To | Amount Paid |
|---|---|---|---|---|
| March | 1934 | Three | April 12, 1934 | $ 7.56 |
| July | 1934 | Four | Aug. 12, 1934 | 10.08 |
| Dec. | 1934 | Five | Jan. 12, 1934 | 12.60 |
| April | 1935 | Four | May 12, 1935 | 10.08 |
| Sept. | 1935 | Four | Sept. 12, 1935 | 10.08 |
| Jan. | 1936 | Four | Jan. 12, 1936 | 10.08 |
| May | 1936 | Four | May 12, 1936 | 10.08 |
| Sept. | 1936 | Four | Sept. 12, 1936 | 10.08 |
| Feb. | 1937 | Six | May 12, 1937 | 15.12 |
| July | 1937 | Two | May 12, 1937 | 5.04 |
| Sept. | 1937 | Two | July 12, 1937 | 5.04 |
| Dec. | 1937 | Three | Oct. 12, 1937 | 7.56 |
| Feb. | 1938 | Six | Apr. 12, 1938 | 15.12 |
| July | 1938 | Three | July 12, 1938 | 7.56 |
| Dec. | 1938 | Three | Oct. 12, 1938 | 7.56 |
| Feb. | 1939 | Two | Dec. 12, 1939 | 5.04 |
| Aug. | 1939 | Six | June 12, 1939 | 15.12 |
| Nov. | 1939 | Two | Aug. 12, 1939 | 5.04 |
| Feb. | 1940 | Four | Dec. 12, 1939 | 10.08 |
| May | 1940 | Three | Mar. 12, 1940 | 7.56 |
| Oct. | 1940 | Five | Aug. 12, 1940 | 12.60 |
| Mar. | 1941 | Six | Feb. 12, 1941 | 15.12" |

Plaintiff also filed in support of her motion for summary judgment the affidavit of Alfred H. Frederick, a court reporter, who reported the testimony of Josephine Hayes (formerly Josephine Zemantaite) given by her when her deposition had been previously taken for the purpose of discovery. Frederick's affidavit merely set forth the questions asked Mrs. Hayes and her answers thereto when her deposition was taken. His affidavit shows that she testified at that time that from 1938 to 1943 she had been the

the period of grace, he will forfeit [illegible] to and his bonds shall be [illegible] and all rights and claims and all money paid into the Alliance [illegible]."

A copy of the insurance certificate [illegible] statement of "Sunny Sidney" Record of payments [illegible] received at the office" were also sent to [illegible] part of [illegible] said record of payments [illegible] monthly [illegible] the seven years prior to [illegible] as follows:

"[illegible]
[illegible]

Became a member on [illegible], 1933.

| Month and Year Paid | Number of Months | Paid to | Amount Paid |
|---|---|---|---|
| March 1934 | [illegible] | [illegible] | [illegible] |
| July 1934 | [illegible] | [illegible] | [illegible] |
| Dec. 1934 | [illegible] | [illegible] | [illegible] |
| April 1935 | [illegible] | [illegible] | [illegible] |
| Sept. 1935 | [illegible] | [illegible] | [illegible] |
| Jan. 1936 | [illegible] | [illegible] | [illegible] |
| May 1936 | [illegible] | [illegible] | [illegible] |
| Sept. 1936 | [illegible] | [illegible] | [illegible] |
| Feb. 1937 | [illegible] | [illegible] | [illegible] |
| July 1937 | [illegible] | [illegible] | [illegible] |
| Sept. 1937 | [illegible] | [illegible] | [illegible] |
| Dec. 1937 | [illegible] | [illegible] | [illegible] |
| Feb. 1938 | [illegible] | [illegible] | [illegible] |
| July 1938 | [illegible] | [illegible] | [illegible] |
| Dec. 1938 | [illegible] | [illegible] | [illegible] |
| Feb. 1939 | [illegible] | [illegible] | [illegible] |
| Aug. 1939 | [illegible] | [illegible] | [illegible] |
| Nov. 1939 | [illegible] | [illegible] | [illegible] |
| Jan. 1940 | [illegible] | [illegible] | [illegible] |
| May 1940 | [illegible] | [illegible] | [illegible] |
| Oct. 1940 | [illegible] | [illegible] | [illegible] |
| Mar. 1941 | [illegible] | [illegible] | [illegible] |

Plaintiff also filed in support of her motion for summary judgment the affidavit of Lloyd H. Frederick, a court reporter, who reported the testimony of Josephine Hayes (formerly Josephine Zomantalle) given by her when her deposition had been previously taken for the purpose of discovery. Frederick's affidavit merely set forth the questions asked Mrs. Hayes and her answers thereto when her deposition was taken. His affidavit shows that she testified at that time that from 1932 to 1943 she had been the

financial and recording secretary of local lodge 101 of the defendant organization; that she knew the decedent, Joseph Shimkus, prior to his death on August 24, 1941 and that during his lifetime he had been a member of said local lodge; that she notified the Home Office of defendant of the death of Shimkus; that during the lifetime of the assured she never prepared or read at a regular meeting of the local lodge a list of delinquent members containing his name; that she never notified the assured during his lifetime that "he was lapsed or expelled from membership in the Lithuanian Roman Catholic Alliance of America"; and that prior to the death of Shimkus she did not receive any notification from the "Home Office" that he "had been lapsed or expelled from membership."

In defendant's answer to plaintiff's motion for summary judgment it asked that such motion be denied and as ground for such denial it presented the counter-affidavits of Leonard Simutis, the president of the defendant organization and William T. Kvetkas, its secretary.

The only pertinent portion of the affidavit of Simutis is as follows: "That Joseph Shimkus was at the time of his decease in arrears in the payment of dues to the Lithuanian Roman Catholic Alliance of America, since February 12th, A. D. 1941, and had been marked delinquent upon the records of said Corporation."

The pertinent portion of the affidavit of Kvetkas is as follows:

"Affiant further states that he is the custodian of the records of the Supreme Council of the said Lithuanian Roman Catholic Alliance of America and that according to his said records, the said Joseph Shimkus paid dues for months up to and including February 12th, 1941, only, and was in arrears at the time of his death.

"Affiant further states that a delinquency notice was mailed to J. Zementaite, Secretary of Lodge 101, dated July 17th, 1941, notifying her that the said Joseph Shimkus would be lapsed if his dues were not paid in full by August 1st, 1941, a true copy of which notice is hereto attached and by reference incorporated herein as if fully herein set forth.

"Affiant further states that there is no record of any further payments made by or on behalf of said Joseph Shimkus."

The notice referred to in Kvetkas'affidavit reads as follows:

"July 17, 1941

Miss J. Zemantaite,
1711 S. Union Ave.,
Chicago, Ill.

Dear Madam:

In re 101 lodge

We are hereby notifying you that Simkus Juozas, Keturakiene Ona and Padleckaite Emilija are in arrears for 6 months each to August 1, 1941, and we request that you inform said members about this, inasmuch as failing to receive these arrears in full with this month's payments, they shall be recorded among the lapsed members.

If your records should show a difference, we would be grateful for your letting us know about it, that we would be enabled to correct the error.

Very truly yours,

WM. T. KVETKAUSKAS
SECRETARY."

As heretofore shown by the averments of defendant's answer, its theory is that the assured was not a member in good standing of the defendant organization at the time of his death; that prior to his death he had been ipso facto suspended by reason of his default in the payment of his dues; that proofs of her father's death were not furnished by plaintiff as required by the certificate of insurance; and that therefore plaintiff was not entitled to recover.

Plaintiff's theory as stated in her brief is that "the

Defendant further in his brief [illegible] motion was mailed to J. Demmatte, secretary of [illegible] on July 17th, 1941, notifying her that the said [illegible] would be lapsed if his dues were not paid [illegible] July 1941, a true copy of which [illegible] and by reference incorporated herein [illegible].

Defendant further [illegible] no record of any further payments made by [illegible] the policy [illegible] follows:

[illegible], 1941

Miss J. Kennedy,
1721 S. Union Ave.,
Chicago, Ill.

Dear Madam:

Re: [illegible]

We are hereby notifying you that [illegible] payments for your [illegible] 3 months each to April 1, [illegible] or inform said [illegible] receive these [illegible] they will be [illegible].

If your records show [illegible] be required for your [illegible] would be obliged to correct [illegible].

Very truly yours,

[illegible]

As heretofore shown by the averments of defendant's answer, its theory is that the assured was not a member in good standing of the defendant organization at the time of his death; that prior to his death he had been long [illegible] suspended by reason of his default in the payment of his dues; that proofs of her father's death were not furnished by plaintiff as required by the certificate of insurance; and that therefore plaintiff was not entitled to recover.

Plaintiff's theory as stated in her brief is that "the

affidavits in support of plaintiff's motion for summary judgment state a prima facie case for recovery, and defendant's counter-affidavits present no defense to plaintiff's claim"; that "the deceased, Joseph Shimkus, was still a member in good standing in the Lithuanian Roman Catholic Alliance of America at the time of his death, as by its past conduct towards him defendant had waived the necessity for prompt payment of dues by him, and plaintiff, his beneficiary, was, therefore, entitled to payment of the benefits due under the certificate of membersip"; and that "Article 23, Paragraph 2 of the defendant's by-laws is not an automatic or self-executing forfeiture provision and defendant took no such affirmative action as would terminate the membership of Joseph Shimkus."

Defendant first contends that the affidavits filed in support of plaintiff's motion for summary judgment "do not conform to the necessary statutory requisites, and are fatally defective, in substance and form, to support the summary judgment under Sec. 57 of the Practice Act and Rule 15 of Supreme Court."

Defendant's profuse argument and the numerous propositions advanced by it in his brief in support of this contention can be of no avail on this appeal in view of the fact that it interposed no objection in the trial court either to the form or substance of plaintiff's supporting affidavits or as to the competency thereof. The right of the trial court to consider said affidavits in determining whether or not plaintiff was entitled to summary judgment was not questioned. While it is true that the affidavit of the court reporter, Alfred H. Frederick, as to the testimony of Mrs. Hayes in her discovery deposition did not conform to the requirements of Rule 15 of the Rules of Practice and Procedure of the Supreme court pertaining to affidavits for summary judgments, defendant is pre-

cluded from questioning the propriety of Frederick's affidavit for the first time in this court. However, even though Frederick's affidavit should be disregarded and eliminated from consideration, plaintiff's right to a summary judgment would not be affected.

None of the facts asserted in plaintiff's affidavit were denied in defendant's counter-affidavits and no facts were set forth in said counter-affidavits which tended to disprove a single fact stated in plaintiff's affidavit. Furthermore, the affidavit of defendant's secretary merely served to fortify the prima facie case made by plaintiff's affidavit, since it was recognized therein that Shimkus was still a member in good standing of the defendant organization up to August 1, 1941, although he was in arrears for six months' dues at that time and since it was not shown by either of defendant's counter-affidavits that any affirmative action was taken prior to his death on August 24, 1941 to expel him from membership or to forfeit his insurance certificate. Thus, no disputed question of fact was presented by the affidavits of the parties.

The only questions presented by the undisputed facts set forth in the affidavits were questions of law, the first of which is whether defendant by its conduct waived the forfeiture provision contained in paragraph 2 of Article 23 of its by-laws and the second is whether defendant by its conduct waived the requirement of the certificate of insurance that plaintiff furnish the defendant with formal "Proofs of Death."

In Baxter v. Metropolitan Life Ins. Co., 318 Ill. 369, in discussing the question of waiver the Supreme court said at pp. 371 and 372:

"The question as to what facts are necessary to constitute a waiver is a question of law. The existence of such facts in a given case is a question of fact. The Appellate Court found that the right of the insurer to insist on the

lapse of the policy for failure to pay the premium within the time required had been waived by its conduct. That that conduct was is a question of fact and is not open to review here, but it must be taken as established that the plaintiff in error had at previous times accepted payments on this policy after the thirty-one days of grace had expired. Waiver by an insurer results when it by an act, statement or course of conduct toward the assured recognizes the policy as existing though the time for payment of the premium has expired. Forfeiture of life insurance policies is not favored, and unless the circumstances show a clear intention to claim a forfeiture for nonpayment of the premium such forfeiture will not be enforced. If the conduct of the insurer is such as to induce the assured to believe that a forfeiture will not be insisted upon, the insurer will be held to be estopped from taking advantage of such forfeiture."

Did the defendant by its conudct waive the forfeiture provision of its by-laws as to Shimkus? It will be noted that the statement and tabulation heretofore set forth, which was furnished to plaintiff by defendant, shows that the decedent had been one of defendant's members since March 12, 1917, or about 24 years up to the time he made his last payment of dues and it also shows an itemization of each payment of dues made by him during the seven years prior to his death. The tabulation shows as to each payment of dues made by Shimkus during said period the "Month and Year Paid," the "Number of Months" paid for, the date to which the particular payment paid the decedent's dues and the "Amount Paid." An analysis of said tabulation discloses that when the decedent made his last payment of six months dues in March, 1941, he was then in arrears for seven months and that he was still delinquent for one month's dues after making such payment; that when Shimkus paid five months' dues in October, 1940, he was then in arrears for seven months and that he was still delinquent for two months after making such payment; that in another instance the decedent was in arrears for six months when he paid four months' dues, leaving him still delinquent; that in five instances the decedent was in arrears for five months' dues when

same were paid and accepted; and that in nine instances the decedent was in arrears for four months' dues when same were paid and accepted. Thus, it appears that regardless of how much plaintiff's father was in arrears in the payment of his dues during the seven years prior to his death he was never treated by the defendant other than as a member in good standing, that his dues were accepted even though he was delinquent from four to seven months when he paid them, that no affirmative action was ever taken to expel or suspend him and that defendant never invoked the so-called self-executing forfeiture provision of its by-laws when the decedent was in arrears in the payment of his dues beyond the three month grace period.

It is not even necessary for plaintiff to depend on her own affidavit to show defendant's conduct toward Shimkus in respect to his payment of dues, because its own counter-affidavits show conclusively that he was not treated as an expelled member whose insurance certificate had been forfeited at any time prior to his death. The counter-affidavit of defendant's president, in so far as it is pertinent, merely states that "Joseph Shimkus was at the time of his decease in arrears in the payment of dues to the Lithuanian Roman Catholic Alliance of America, since February 12th, A. D. 1941, and had been marked delinquent upon the records of said Corporation." There is absolutely no significance in the fact that Shimkus was "marked delinquent" on defendant's records since February 12th, 1941. He had been delinquent for a sufficient number of months to warrant his suspension or expulsion during the greater part of the seven years prior to his death and yet he was never treated or considered during that time other than as a member of the defendant organization in good standing.

The affidavit of defendant's secretary merely recites

same were paid and accepted, and that in fact [illegible] the decedent was in arrears for four months' dues [illegible] same were paid and accepted. Thus, it [illegible] of for much plaintiff's father was in arrears in [illegible] payment of his dues during the seven years prior to his [illegible] treated by the defendant [illegible] rendering, that his [illegible] delinquent from [illegible] that no affirmative action [illegible] him and that defendant [illegible] according [illegible] are in arrears in the [illegible] month grace period.

It is not [illegible] or on an affidavit to [illegible] in respect to the payment of [illegible] affidavits also contain [illegible] expelled members [illegible] at any time prior to his [illegible] of defendant's [illegible] states that "[illegible] are in arrears in the payment of dues [illegible] affiliate of marine, whose [illegible] been marked delinquent upon the record [illegible] upon [illegible] There is absolutely no [illegible] was "marked delinquent" on defendant's records since [illegible] 1941. He had been delinquent for [illegible] number of months to warrant his suspension or expulsion during the greater part of the seven years prior to his death and yet he was never treated or considered during that time other than as a member of the defendant organization in good standing.

The affidavit of defendant's secretary merely recites

that Shimkus' dues were paid up to February 12, 1941 and that he was in arrears at the time of his death and then states that "a delinquency notice was mailed to J. Zementaite, Secretary of Lodge 101, dated July 17th, 1941, notifying her that the said Joseph Shimkus would be lapsed if his dues were not paid in full by August 1st, 1941."

Even a casual reading of the counter-affidavit of Secretary Kvetkas demonstrates that it completely refutes defendant's contention that Shimkus was expelled ipso facto at any time prior to his death and that the rights of himself and his beneficiary under his insurance certificate were forfeited because of his failure to pay his dues within the grace period of three months as provided in paragraph 2 of Article 23 of defendant's by-laws and constitution.

The decedent certainly could not have been automatically expelled and still officially recognized in Secretary Kvetkas' affidavit as a member in good standing on July 17, 1941, when he was more than five months in arrears. Kvetkas' affidavit went further and stated in effect that Shimkus would continue to be recognized as a member in good standing if he paid his dues by August 1, 1941, at which time he would have been six months in arrears. Kvetkas did state in his affidavit that "there is no record of any further payments made by or on behalf of said Joseph Shimkus" but it is not stated in either of defendant's affidavits that it took any affirmative action between August 1, 1941 and August 24, 1941, when Shimkus died, to expel him or to forfeit his insurance certificate.

The law is well settled in this state that a beneficial insurance organization may by its own conduct waive the necessity for prompt payment of dues by permitting a member thereof to make payments after they are due and this is particularly true where such a course of conduct has been carried on over a long

that Hinkins' dues were paid up to January 1, 1941, and that he was in arrears at the time of his death and then states that "a delinquency notice was mailed to V. Insurance Secretary of Lodge 1141, dated July 17th, 1941, notifying her that the said Joseph Hinkins would be lapsed if his dues were not paid in full by August 1st, 1941."

Upon a careful reading of the interrogatories and Secretary's replies defendant's contention that Hinkins was delinquent at any time prior to his death and that the rights of insured and his beneficiary under his insurance were forfeited because of his failure to pay his dues within the grace period of thirty days, is not in accordance with which of the constitution.

The defendant's contention that Hinkins was expelled and that all of his rights were lost in accordance with the affidavit as a member in good standing, 1941, the he was more than thirty months in arrears, which constitutes ground for expulsion and stated in the affidavit that Hinkins could continue to be recognized as a member in good standing if he paid his dues by August 1, 1941, or within thirty days from the month in question. Nothing was stated in the affidavit that "there is no record of any further payments made by or on behalf of said Joseph Hinkins" but it is not stated in either of defendant's affidavits that it took any affirmative action between August 1, 1941 and August 24, 1941, when Hinkins died, to expel him or to forfeit his insurance certificate.

The law is well settled in this at to what a beneficiary insurance organization may by its o n conduct waive the necessity for prompt payment of dues by permitting a member thereof to make payments after they are due and this is particularly true where such a course of conduct has been carried on over a long

period of time.

Defendant having established a course of dealing with the decedent as to the payment of his dues, always accepting them and never refusing them, irrespective of when he paid them or the amount of his delinquency at the time, it must be held that it waived the prompt payment of dues by Shimkus and the forfeiture provision of its by-laws.

In Riddle v. General Union of International B., Etc., 309 Ill. App. 163, the deceased, Graber, was a member of the defendant union. His administrator made application to the union for the payment of the death benefits specified in its constitution for members who were in good standing at the time of their death and for six months prior thereto. The union refused payment on the ground that Graber was in arrears for two months at the time of his death. The trial court entered judgment in favor of the plaintiff for $300 and the union appealed. In affirming the judgment of the trial court this court said at pp. 164-167:

"Appellant claims that the deceased at the time of his death was not in good standing because the December and January dues had not been paid in advance. The receipts showing payment show clearly and conclusively that appellant adopted a different system of payment from that which it claimed - that is, in advance; that it accepted the dues of the deceased almost as he wished to pay them - never in advance, always in arrears, and when he paid two months at a time instead of one it still left him in arrears. Notwithstanding this the appellant accepted his money and kept him as a member in good standing of its union, and continued to accept the money time and time again under this different system, which apparently met the convenience of the deceased.

"We have so often held that this course of conduct waives the payment prescribed in insurance policies and other like obligations that it seems futile to repeat it here. ***

"***

"In Harris v. Sovereign Camp of Woodmen of the World, 374 Ill. 47, our Supreme Court said:

"'We approve of the judgment of the Appellate court on the only question which we have power to review. In Dromgold v. Royal Neighbors of America, 261 Ill. 60, 103 N. E. 584, we held that a subordinate lodge or council is the agent of the supreme lodge or council, notwithstanding the declaration of any

period of time.

Defendant having [illegible] a course of [illegible] the decedent as to the payment of his dues, [illegible] them and never returning them, [illegible] to pay them or the amount of his [illegible], it must be held that it waived the payment [illegible] and the forfeiture provision of the [illegible].

In Hobbie v. [illegible], [illegible] 309 Ill. App. 109, the decedent [illegible] of the defendant union. His [illegible] union for the payment of [illegible] [illegible] nonadmission for [illegible] of their dues and for [illegible]. The union refused payment on [illegible] to admit at the time of [illegible]. [illegible] judgment in favor of the [illegible] union appealed. In [illegible] the judgment [illegible] court said at pp. [illegible]:

"[illegible] [illegible] of his [illegible] not be [illegible] [illegible] different system of payment [illegible] - that is, by only [illegible] - never [illegible] [illegible] and [illegible] to [illegible] - never [illegible] [illegible] [illegible] left him in arrears. [illegible] [illegible] of [illegible] and [illegible] and kept him as a member [illegible] or his [illegible] and continued to accept the money thus [illegible] under which the different system, which [illegible] of the decedent.

"We have so often held that a [illegible] of contract waives the payment provided for in [illegible] collection and other like obligations that it seems futile to repeat it here. [illegible]

***"

"In Hertle v. Sovereign Camp of Woodmen of the World, 274 Ill. 47, our Supreme Court said:

"'We approve of the judgment of the Appellate court on the only question which we have power to review. In Dromgold v. Royal Neighbors of America, 201 Ill. 60, 105 N. E. 294, we held that a subordinate lodge or council is the agent of the supreme lodge or council, notwithstanding the declaration of any

by-law to the contrary; that where a member is required to pay dues to the local lodge, the local lodge, in that matter, is the agent of the supreme lodge, and is the authority with whom members must deal, and upon whose actions, within the scope of its authority, the members may rely; that if a benefit society permits a subordinate lodge and its officers to act in such a manner in receiving dues that the member is justified in believing that the reasons for forfeiture specified in the by-laws have been waived, the society cannot set up such a forfeiture nor rely thereon as a defense to a suit on the benefit certificate. This case is so close to that one on the facts that we might quote much of the opinion here, but deem it unnecessary.'

"These decisions, together with many others that might be cited, would seem to have settled once and for all the question of waiver of payment in such cases. The facts in this case show to our mind that if deceased had lived and sent in his payment at the date he died, instead of dying, the appellant would have willingly received it. It was only when 'pay-day' came that it fell back upon its strict adherence to the rule that dues must be paid in advance."

In Bayci v. Rango, 304 Ill. App. 203, this court said at pp. 210, 211:

"In an attempt to give a pretense of merit to the defense, the claim was feebly made that the deceased was not a member in good standing at the time of his death. The deceased, under the Constitution of the International Union, should have paid to Rango, Secretary-Treasurer of Local 548, his death benefit dues of eighty cents for the month of May, 1937, on the first day of that month. He died 'suddenly' on May 24, and the dues for that month had not been paid. Under the particular facts of this case there is not the slightest merit in the instant contention. The record showing the payments by the deceased of death benefit dues to Local 548 from June, 1935, to April 27, 1937, is before us, and it shows that during that entire period the deceased never paid his monthly death benefit dues on the first day of the month. To instance: The dues for January and February, 1937, were paid on March 1, 1937; and the dues for March and April, 1937, were paid on April 27, 1937. At no time during the period covered by that record does it appear that the deceased was suspended or that dues were refused by the Local or International Union; *** Under numerous decisions of this State the provision of the Constitution of the International Union requiring the members to pay the death benefit dues on the first of the month was, under the facts, waived. To refer to a few cases: Dugan v. International Ass'n of Bridge & Structural Workers, 202 Ill. App. 308; Railway Passenger & Freight Conductors' Mutual Aid & Benefit Ass'n v. Tucker, 157 Ill. 194; Dromgold v. Royal Neighbors, 261 Ill. 60; Olszewski v. Fitchie, 287 Ill. App. 452."

The second question of law presented on the face of the affidavits is whether plaintiff is barred from maintaining this action by reason of her failure to furnish defendant with "Proofs" of the decedent's death as required by the insurance

The second question of law presented on the face of the affidavits is whether plaintiff is barred from maintaining this action by reason of her failure to furnish reformant with "proofs" of the decedent's death as required by the insurance

certificate. Plaintiff concedes that she did not furnish the defendant with formal "Proofs of Death" of the decedent as required by the insurance certificate but she asserts that defendant waived the necessity for furnishing such proofs.

It has been repeatedly held that where a mutual benefit society or similar organization denies all liability for the payment of a death benefit on the ground that the deceased had forfeited all rights of beneficial membership and was no longer a member of such society or organization the beneficiary of the assured is excused from the necessity of furnishing formal proofs of death.

In United Brotherhood of Carpenters & Joiners v. Fortin, 107 Ill. App. 306, the decedent was a member of a trade union until his death. Plaintiff his widow, made a claim for the funeral benefit of $200. The defendant union contested the claim upon the ground, among others, that no proofs of death were furnished. The court said at pp. 311 and 312:

"The third objection of plaintiff in error is that the widow did not 'present' to the local union a certificate of the facts from the attending physician', as is required by section 109 of the constitution. This is a condition precedent to the right of recovery. Unless it is waived, noncompliance with this condition (which is admitted) bars a recovery. To excuse the lack of such certificate, defendant in error says she saw Paul Hudon, the financial secretary of the local union, in reference to her death benefit, and he answered her that they did not owe her anything because her husband was not in good standing. *** She must be content to lay the same [her claim] before some one of its officers who had authority to receive it. In our opinion, the financial secretary is that officer, and that by his denial of all liability, she was excused from the necessity of presenting such certificate. The agent of such a corporation, charged with the duty of receiving proofs of death, prima facie has the power to waive the presentation of such proofs by refusing to recognize any liability upon the part of his principal."

(To the same effect are Order of Chosen Friends v. Austerlitz, 75 Ill. App. 74; Anderson v. Supreme Council of Order of Chosen Friends, 135 N. Y. 107; Metropolitan S. F. A. Ass'n v. Windover, 137 Ill. 417, 434; Dial v. Valley Mut. Life Ass'n, 29 S. C. 560; Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696; Covenant

Mut. Ben. Ass'n v. Spies et al., 114 Ill. 463.)

This brings us to the question as to whether the trial court was warranted in allowing plaintiff's motion for summary judgment. The law applicable to the consideration and determination of such a motion is clearly set forth in Spry v. Chicago Ry. Equipment Co., 298 Ill. App. 471, where the court said at p. 478:

"The Civil Practice Act provides for the entry of a summary judgment 'unless the defendant shall *** show he has a sufficiently good defense on the merits to all or some part of plaintiff's claim to entitle him to defend the action.' ***

"As to what constitutes a good defense, this court stated in Chicago Title & Trust Co. v. Cohen, 284 Ill. App. 181: 'The primary purpose of Section 57 of the Civil Practice Act is to enable the court to determine whether there is an issue of fact which should be tried. In Dawn v. Massarene, 192 N. Y. S. 577, the Appellate Division of the Supreme Court, construing a similar section, said: 'The defendant must show he has a bona fide defense to the action, one which he may be able to establish. It must be a plausible ground of defense, something fairly arguable and of a substantial character. This he must show by affidavits or other proof.'

"The trial court, of course, must determine from the affidavits filed whether the defendant has interposed a sufficiently good defense to entitle it to defend, but where defendant's affidavits present no substantial triable issues of fact, the court will grant the motion for summary judgment."

We are impelled to hold that the affidavits presented no triable issues of fact; that the questions of law presented thereby were properly decided adversely to defendant and that the trial court did not err in granting plaintiff's motion for summary judgment.

Numerous other points, many of them highly technical, have been urged and considered but we do not think it would serve any useful purpose to discuss them.

In view of the record in this case we feel constrained to say that it is regrettable that a religious beneficial society like the defendant herein should have fought the claim of a beneficiary of a member who had paid dues to the organization for a period of 24 years.

Mut. Ben. Assn v. Johns et al., 114 Ill. 403.)

This brings us to the question as to whether the trial court was correct in granting plaintiff's motion for summary judgment. The law applicable to the consideration and determination of such a motion is clearly set forth in Pery v. Chicago Lumbermen's Ass'n, 250 Ill. App. 471, where the court said on p. 478:

"The civil procedure act provides that a party of a summary judgment in his favor upon a motion, when there is no material fact or facts in issue and he is entitled to a judgment as a matter of law. The burden is on the moving party to show that there is no material issue of fact and that he is entitled to judgment as a matter of law. The court must view the pleadings, affidavits, depositions and admissions in the light most favorable to the party against whom the motion is made, and if there is any doubt as to the existence of a material issue of fact, the motion should be denied. It is not the province of the court to determine issues of fact, but only to determine whether there is any material issue of fact. If there is any doubt as to the existence of a material issue of fact, the motion should be denied. If there is no material issue of fact, the court will enter an order for summary judgment."

We have carefully considered the briefs and the authorities presented in behalf of the respective parties. We find no tangible basis of fact, that the decisions of law presented thereby are inapposite, and we feel necessarily constrained to conclude that the trial court did not err in granting plaintiff's motion for summary judgment.

Numerous other points, many of them admittedly technical, have been argued and considered, but we do not think it would serve any useful purpose to discuss them.

In view of the record in this case we feel constrained to say that it is regrettable that a religious beneficial society like the defendant herein should have fought the claim of a beneficiary of a member who had paid dues to the organization for a period of 24 years.

The trial court failed to make an allowance to defendant for the six months' dues which Shimkus was in arrears at the time of his death and which, at $2.52 per month, amounted to $15.12.

While the trial court properly allowed plaintiff's motion for summary judgment, it erred in failing to allow defendant a credit of $15.12 for the six months' dues which the decedent was in arrears at the time of his death. The judgment of the trial court will therefore be reduced to that extent.

JUDGMENT REVERSED AND JUDGMENT HERE FOR $1151.54 IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT.

Friend, P. J., and Scanlan, J., concur.

The trial court failed to make an allowance to defendant for the six months' wage which children were in arrears at the time of his death and which, at $[illegible]/month, amounted to $[illegible].12.

While the trial court properly allowed [illegible]'s motion for summary judgment, it erred in failing to allow defendant a credit of $[illegible].12 for the six months' wage which the accident was in arrears at the time of his death. The judgment of the trial court will therefore be reversed to that extent.

[illegible]
[illegible]
[illegible]

Friend, P. J., and Hamilton, J., concur.

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323 I.A. 336

| | | |
|---|---|---|
| MABEL NEW and HILDA YOUNGREN, Appellees, | ) | APPEAL FROM CIRCUIT |
| v. | ) | COURT, COOK COUNTY. |
| ABELL HOWE COMPANY, a corporation, Appellant. | ) | |

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiffs, Mabel New and her mother, Hilda Youngren, to recover damages for personal injuries alleged to have been sustained by them as the result of the negligence of the defendant, Abell Howe Company, in the operation of a truck owned by it. The jury returned verdicts finding the defendant guilty as to both plaintiffs and assessed Mabel New's damages at $3500 and Hilda Youngren's damages at $1500. Hilda Youngren, having consented to a remittitur of $1,000, judgment was entered against the defendant in her favor for $500 and judgment for $3500 was entered against the defendant on the verdict in favor of Mabel New. Defendant appeals from both judgments.

Inasmuch as the judgments entered herein will have to be reversed and since the case will in all likelihood be retried, we refrain from stating or discussing the evidence at any greater length than is necessary to show the reasons for our reversal.

Plaintiffs stepped from the north curb of Madison street onto the east crosswalk of Karlov avenue with the intention of proceeding on said east crosswalk to the south side of Madison street. There was a safety island north of the north or west bound street car track on Madison street and to the east of the east crosswalk of Karlov avenue. The distance from the north curb of Madison street to the northernmost street car rail was about 30 or 35 feet.

There were traffic signals on the four corners of this intersection and, when plaintiffs left the north curb of Madison street and started to walk south on the east crosswalk of Karlov avenue, the green light was with them for north and south traffic. After they had walked south on the crosswalk to a point about even with the safety island, the traffic signal changed to amber and plaintiffs stopped, knowing that the signal light would almost immediately change to green for east and west traffic. They were injured by contact with defendant's truck which was being driven west in or approximately in the rails of the west bound street car track on Madison street. Both plaintiffs testified that prior to being injured they did not look east for the approach of traffic on the west bound street car track on Madison street and that if they had looked they could have seen several blocks toward the east.

Defendant's theory is that immediately prior to the accident plaintiffs were on the east crosswalk of Karlov avenue and that "while the truck was being operated in a westerly direction on Madison street, at a reasonable rate of speed, in the car track and while proceeding in a straight line the two plaintiffs walked into the side of the truck."

Plaintiffs' theory, as stated on the first page of their brief as to their position at and immediately prior to the time of the accident, is that they "started across Madison street, on the east crosswalk of Karlov avenue, with the traffic lights in their favor, that they reached the safety island and stopped, and were on or at the end of the island in a position of apparent safety when they were hit by defendant's truck, which was west bound on Madison street."

There were traffic signals on the four corners of this intersection and, when plaintiffs left the north curb of Madison street and started to walk south on the east crosswalk of Ashlov avenue, the green light was with them for north and south traffic. After they had walked south on the crosswalk to a point about even with the safety island, the traffic signal changed to amber and plaintiffs stopped, for they knew the signal light would almost immediately change to green for east and west traffic. They were injured by contact with defendant's truck which was [illegible] in or approximately in the middle of the west bound street car track on Madison street. Both plaintiffs testified that at prior to being injured they did not look east for the approach of traffic on the west bound street car track on Madison street and that if they had looked they could have seen several blocks toward the east.

Defendant's theory is that Arnold [illegible] prior to the accident plaintiffs were on the east crosswalk of Ashlov avenue and that while the truck was being operated in a westerly direction on Madison street, at a reasonable rate of speed, in the car track and while proceeding in a straight line the two plaintiffs walked into the side of the truck."

Plaintiffs' theory, as stated on the first page of their brief as to their position at the intersection prior to the time of the accident, is that they started across Madison street, on the east crosswalk of Ashlov avenue, with the traffic lights in their favor, that they reached the safety island and stopped, and were on or at the end of the island in a position of apparent safety when they were hit by defendant's truck, which was west bound on Madison street."

This statement of plaintiffs' theory is, to say the least, confusing, because it places them at the time they were injured either on the safety island or on the crosswalk "at the end of the safety island" waiting to proceed south across Madison street. Their real theory, as stated and reiterated in the argument in their brief, seems to be that "while they were standing on the raised portion of the safety island they were struck by defendant's truck," that they "were standing on the raised portion of the safety island and the side of the defendant's truck hit them" and that "they were standing on the safety island when they were struck by defendant's truck which had an overhang."

It is readily apparent that, if plaintiffs were standing on the raised portion of the safety island when they were injured, the question as to what constituted due care on their part and negligence on defendant's part would be essentially different than if they were standing on the east crosswalk of Karlov avenue waiting to cross the streetcar tracks on Madison street. Therefore the position of plaintiffs immediately prior to and at the time they were injured - as to whether they were on the raised portion of the safety island or on the crosswalk - has a material bearing on the question of the exercise of due care by them as well as on the question of the alleged negligence of the defendant.

Plaintiff, Hilda Youngren, did not testify at all as to the position of herself and her daughter before the accident. In her testimony she stated that she had no recollection at all as to what happened except that after the accident "she was on the street near the sidewalk."

In respect to the position of her mother and herself at and immediately prior to the time of the accident plaintiff, Mabel New, testified as follows on direct examination:

This statement of plaintiff's theory is, to say the least, confusing, because it places them at the time they were injured either on the safety island or on the crosswalk "at the end of the safety island" intending to proceed south across Madison street. Their real theory, as it did not materialize in the argument in their brief, seems to be that "while they were standing on the safety portion of the safety island they were struck by defendant's bus", that they "were standing on the raised portion of the safety island and the side of the defendant's bus struck them", or that "they were at rating on the safety island when they were struck by defendant's bus which had an overhang."

It is readily apparent that, if plaintiffs were standing on the raised portion of the safety island when they were injured, the question as to what transpired came on their part and negligence on defendant's part would be essentially different than if they were standing in the crosswalk of Harlov Avenue waiting to cross the street to the south on Madison street. Therefore the jurisdiction of the Municipal Court of Chicago is entirely proper to find out the true facts in the matter - as to whether they were on the raised portion of the safety island or on the crosswalk - because it is material in the determination of the exercise of due care by them as well as in the question of the alleged negligence of the defendant.

Plaintiff, Nikki Sorgen, did not testify at all as to the position of herself and her daughter before the accident. In her testimony she stated that she had no recollection at all as to what happened except that after the accident "she was on the street near the sidewalk."

In respect to the position of her mother and herself at and immediately prior to the time of the accident plaintiff, Mabel Moe, testified as follows on direct examination:

"Q. As you walked across on the crosswalk what, if any, change was there in the light for north and south bound traffic as you neared the center of the street? A. We got to the safety island when the light turned amber. Q. The safety island, will you describe that to this jury? A. Well, that is a raised island on the side of the car line and it slants down as it gets to the crosswalk, and we were standing <u>on the raised section, on the crosswalk also</u>. *** Q. How long did you remain standing on the safety island? A. I would say a minute or so for the lights to change. *** Then what happened to you? A. Well, I was standing there waiting for the light to change and the light turned green when I was thinking about going out, when this truck hit me." (Italics ours.)

She testified on cross-examination:

"Q. You were about at the end of that safety island, were you not, at the end, the west end of it? A. <u>Level with the safety island on the crosswalk</u>, yes." (Italics ours.)

It will be noted from the foregoing testimony of Mabel New that she stated that "we were standing on the raised section" of the safety island and "on the crosswalk also" and that they were standing "level with the safety island on the crosswalk."

From the present state of the evidence in the record it is impossible for us to fairly determine whether plaintiffs were on the raised portion of the safety island or on the crosswalk when they were injured. One thing is certain and that is they could not have been in both places at the same time. It is a matter of common knowledge that the raised portion of a safety island never extends onto any portion of the crosswalk but gradually tapers down to the level thereof and it was incumbent upon plaintiffs to show

"Q. As you walked across on the crosswalk then, if any, change was there in the light for north and south bound traffic as you neared the center of the street? A. Up out to the safety island when the light turned amber. Q. The safety island, will you describe that to the jury? A. Well, that is a raised island on the side of the car line and it climbs down as it gets to the crosswalk, and a more [illegible] raised section, on the crosswalk line. [illegible] Q. How long did you remain standing on the safety island? A. Only a few minutes or so for the lights to change. [illegible] to your A. Well, I [illegible] to change and the lights turned green [illegible] going out, then the green lights."

The testimony on cross-examination:

"Q. You were about at the end of the safety island, were you not, I [illegible] the end of the [illegible] the safety island on the crosswalk, yes."

It will be noted from the [illegible] testimony of [illegible] Mrs. that she stated that "we were standing on the [illegible] section" of the safety island and "on the crosswalk line" and that they were standing alongside the safety island on the crosswalk."

From the present state of the evidence in the record it is impossible for us to fairly determine whether plaintiffs were on the raised portion of the safety island or on the crosswalk when they were injured. The record is certain and that is they could not have been in both places at the same time. It is a matter of common knowledge that the raised portion of a safety island never extends onto any portion of the crosswalk but gradually tapers down to the level thereof and it was incumbent upon plaintiffs to show

with a reasonable degree of certainty where they were at the time they were injured.

We do not wish to be understood from anything we have said herein as intimating that plaintiffs cannot prove their case in either event - whether they were on the raised portion of the safety island or on the crosswalk - when they were injured. Neither do we wish to be understood as intimating that defendant cannot successfully defend against plaintiffs' claim in either event - whether they were on the raised portion of the safety island or on the crosswalk - when they were injured.

Defendant contends that the trial court erred in refusing to give three certain instructions tendered by it. We deem it unnecessary to discuss the propriety of these instructions, since it is fair to assume that the jury will be correctly instructed when this case is retried.

We are impelled to hold that the verdicts were against the manifest weight of the evidence and that the ends of justice will be best served by a retrial of this case.

For the reasons stated herein the judgments of the Circuit court of Cook county are reversed and the cause is remanded for a new trial.

JUDGMENTS REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Scanlan, J., concur.

with a reasonable degree of certainty where they were at the time they were injured.

We do not wish to be understood from anything we have said herein as intimating that plaintiffs cannot prove their case in either event - whether they were in the reduced portion of the safety island or on the crosswalk - when they were injured. Neither do we wish to be understood as intimating that defendant cannot successfully defend against plaintiffs' claim in either event - whether they were on the reduced portion of the safety island or on the crosswalk - when they were injured.

Defendant contends that the trial court erred in refusing to give these certain instructions requested by the defendant, since it is their duty to ascertain what the law is and correctly instruct the jury thereon by instructions, since it is their duty to ascertain what the law is and correctly instructed the jury thereon by instructions.

We are impelled to hold that the verdicts were contrary to the manifest weight of the evidence and that the ends of justice will be best served by a reversal of this case.

For the reasons stated herein the judgments of the Circuit court of Cook county are reversed and the cause is remanded for a new trial.

Reversed and remanded.

Tolman, P. J., and Wolfe, J., concur.

43499

INDUSTRIAL NATIONAL BANK OF CHICAGO,
Appellant,

v.

HAROLD SCHOR et al.

N. H. ALTENBERG,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.



MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by plaintiff, Industrial National Bank of Chicago, seeks to reverse an order which vacated a judgment entered on August 25, 1944 reviving an original judgment by confession entered on July 7, 1927.

There is no dispute as to the facts. The Industrial National Bank of Chicago, which is the successor by conversion to the Personal Loan and Savings Bank, procured a judgment by confession on July 7, 1927 in the Municipal court of Chicago against Harold Schor, N. H. Altenberg and Morris Rosenstein. On July 20, 1944 the plaintiff instituted proceedings for the revival of the judgment by confession, caused summons to issue and delivered same to the Bailiff of the Municipal court, who returned it with his indorsement thereon "no service." Thereupon plaintiff caused an alias summons to issue against the defendants which was likewise returned indorsed "no service." Notwithstanding that none of the defendants had been served with summons and without notice to them of any kind, plaintiff procured a judge of the Municipal court to enter the following judgment order of revival on August 25, 1944:

"Now comes the plaintiff in this cause and moves the

Court for judgment on scire facias and the Court being fully advised in the premises sustains said motion and thereupon it is ordered that the judgment of July 7th, 1927, against the defendants, Harold Schor, Nathan H. Altenberg and Morris Rosenstein, for the sum of Three Hundred Three and 60/100 Dollars ($303.60) be and the same is hereby revived for full amount and costs of both proceedings."

It will be noted that the foregoing judgment order is completely silent as to whether or not the trial court had jurisdiction and as to whether or not the defendants or any of them had been served with process.

Pursuant to the revived judgment plaintiff caused execution to issue against the defendants, which was returned nulla bona. It then instituted garnishment proceedings on said revived judgment. On April 19, 1945 defendant Altenberg, the sole appellee herein, appeared specially and petitioned the trial court to set aside and vacate the revival judgment of August 25, 1944. His petition alleged in substance that the revival judgment had been entered without service of process upon him and that it was therefore void, because the trial court did not acquire and have jurisdiction of his person.

Plaintiff filed an answer to appellee's petition and after a hearing on said petition and answer the trial court entered the order vacating the judgment of revival of August 25, 1944, from which order this appeal is taken.

Plaintiff urges six points for reversal, contending that "a petition under Section 20-1/2 of the Municipal Court Act cannot serve the office of an appeal"; that "error of law is to be distinguished from error in fact or error in the nature of error coram nobis"; that "the only defenses to a revival of the judgment by scire facias or ordinary

Court for judgment on scire facias and the Court being fully advised in the premises sustains said motion and thereupon it is ordered that the judgment of July 7th, 1927, against the defendants, [illegible], [illegible] Altenberg and Morris [illegible], for the sum of Three Hundred Three and [illegible] Dollars ([illegible]) be and the same is hereby revived for full amount and costs of both proceedings."

It will be noted that the foregoing judgment order is completely silent as to whether or not the trial court had jurisdiction and as to whether or not the defendants or any of them had been served with process.

Pursuant to the revived judgment [illegible] execution [illegible] *mitts long*. [illegible] said revived [illegible] Altenberg, the [illegible] the trial court [illegible] judgment of August 25, 194[illegible] the revival judgment [illegible] process upon him [illegible] the trial court had no jurisdiction of his person.

[illegible] after a hearing on a petition [illegible] entered the order vacating the judgment of August 25, 194[illegible], from which order this appeal is taken.

Plaintiff urges six points for reversal, contending that "a petition under section 2-1/2 of the Municipal Court Act cannot serve the office of an appeal"; that "error of law is to be distinguished from error in fact or error in the nature of error *coram nobis*"; that "the only defenses to a revival of the judgment by scire facias or ordinary

civil action to revive are nul tiel record, payment or release"; that "in proceedings for the revival of a judgment requirements for obtaining jurisdiction are not as strict as those required to obtain the original judgment and in a revival proceeding the defendant may submit himself to the jurisdiction of the Court by less definite conduct than in an original pleading"; that "a special appearance asking any other than jurisdictional relief becomes a general appearance even though it is called special"; and that "proceedings to revive a judgment so that execution may issue after seven years do not constitute a new suit but are a continuation of and a part of the original suit."

We find no merit in any of these contentions and are impelled to conclude that they are injected herein solely for the purpose of beclouding the only real question in this case and that is whether the revival judgment was void because the trial court had no jurisdiction to enter it.

The petition to vacate the revival judgment was not filed under section 20-1/2 of the Municipal Court Act and that section certainly is not involved here. There is no occasion in this case to distinguish between error of law, error of fact or error in the nature of error coram nobis, because the lack of jurisdiction of the trial court is not only clearly shown on the face of the record but must necessarily be admitted. This case is not concerned with defenses on the merits to an action to revive a judgment nor is it concerned with the proposition that a proceeding to revive a judgment does not constitute a new suit but is a continuation and a part of the original suit. Regardless of whether such a proceeding constituted a new suit or was a continuation of the original suit, there can be no question

[illegible]

but that a valid revival judgment could not be entered against the defendants unless the trial court had acquired jurisdiction over their persons. As heretofore stated, the only real question presented for our determination is whether the revival judgment was void and the trial court had the right to set it aside approximately 8 months after the date of its entry. As already shown, the record discloses on its face that the revival judgment was entered against the defendants without any service of process upon them and without a general appearance having been filed by them. It is elementary that under such circumstances the trial court lacked jurisdiction of the person of the appellee and its judgment against him was clearly void and a nullity. In the early case of Wilson v. Greathouse, 1 Scam. 174, the Supreme Court said at p. 175:

"It is essential to the exercise of all jurisdiction rendering judgments or decrees affecting the persons or property of individuals, where the proceeding is by summons directed to the defendants, that they should have indisputable evidence before them that the party to be affected by their judgments or decrees, is regularly before them, otherwise their proceedings are coram non judice; consequently irregular and void."

In Hunsaker v. Watts, 257 Ill. App. 351, the court said at p. 353:

"The matter under consideration has been repeatedly passed upon, and is well settled. *** In Belingall v. Gear, 3 Scam. 575, the court points out that: 'Before a court is authorized to render a judgment by default, it must appear clearly and affirmatively, by the return of the officer charged by law with the service of the process, that the defendant has been regularly served.' And in Vairin v. Edmonson, 5 Gilm. 270, the court held: 'To sustain a judgment by default, the record ought affirmatively to show that the defendant was regularly served with process.' To the same effect is Law v. Grommes, 158 Ill. 492."

In People v. Miller, 339 Ill. 573, the court said at pp. 578-9:

"Every judgment of a court rendered without jurisdiction is a nullity - not merely voidable but void - and may be disregarded. *** It is a fundamental principle and an

but that a valid revived judgment could not be entered against the defendants unless the trial court had acquired jurisdiction over their persons. Therefore, it had, the only real question presented for our determination is whether the revived judgment was void and the trial court had the right to set it aside approximately 8 months after the date of the entry, as already shown, the record disclosed on the face that the revived judgment was entered against the defendants without any service of process upon them and without a general appearance having been filed by them. It is elementary that such an alias execution the trial court had no jurisdiction of the person of the appellee and its judgment was therefore clearly void and a nullity. In the recently case of Jackson v. Hesselbourg, 1 Ccam. 474, the supreme court said at p. 475:

> "It is essential to the validity of all judgments requiring judgments or decrees against persons or property of individuals, where the court did not by summons directed to the defendants, but they should have jurisdiction of evidence before them that the party to be affected by their judgments or decrees, is negligently b[illegible] them, otherwise their proceedings are coram non judice, some nullity therefore and void."

In Lansdowne v. [illegible], 17 Ill. [illegible], the court said at p. 320:

> "The other under a[illegible] view [illegible] been repeatedly passed upon, and is well settled. See, in Schmelzle v. Schmelzle, 3 Scam. 374, the court points out that 'before a court is authorized to render a judgment by default, it must appear clearly and affirmatively, by the return of the officer charged by law with the service of the process, that the defendant has been regularly served.' See also Johnson v. Simonson, 3 Gilm. 270, the court held: 'To authorize a judgment by default, the record ought affirmatively to show that the defendant was regularly served with process.' To the same effect is Law v. Crosses, 145 Ill. 492."

In People v. Miller, 349 Ill. 71, the court said at pp. 378-9:

> "Every judgment of a court rendered without jurisdiction is a nullity - not merely voidable but void - and may be disregarded. *** It is a fundamental principle and an

essential element of due process of law that no adjudication of a court is valid against the person or property of an individual without notice and an opportunity to be heard. A judgment without such notice and opportunity to be heard is not a judicial determination of the rights of the party against whom it is rendered and is not entitled to respect in any court."

It has been repeatedly held that a void judgment may be assailed at any time in any court, either directly or collaterally, and may be set aside on motion made in the trial court at any time or term of court after its entry.

In Anderson v. Anderson, 292 Ill. App. 421, the court said at p. 428:

"As to appellant's contention that the only proper method of attacking the validity of the decree of divorce was by bill of review, it is sufficient to say that where a decree or judgment is void for want of jurisdiction of the person of the defendant, it is a nullity and may be expunged from the records of the court at any time. It is universally conceded that a judgment void for want of jurisdiction over the person of the defendant may be vacated on motion, irrespective of lapse of time. (Freeman on Judgments, 2nd ed. sec. 98.) A court has power to vacate a judgment or decree at any time after expiration of the term at which it was rendered, where the court was without jurisdiction to enter such judgment or decree."

To the same effect is Genden v. Bailen, 275 Ill. App. 382.

Plaintiff, after asserting that a special appearance asking any other than jurisdictional relief becomes a general appearance even though it is called special, insists that although defendant characterized his appearance as special and limited, it became a general appearance which waived the service of process upon him because his petition to vacate the revival judgment, in addition to asking that such judgment be set aside, also prayed that "all supplementary process be quashed and that the pending garnishment be likewise quashed, and that petitioner may have such other and further relief as may be meet in the premises." This contention does not merit serious consideration. It is readily apparent that the only relief sought by appellee in his petition, other

essential element of due process of law that no adjudication of a court is valid against the person or property of an individual without notice and an opportunity to be heard. A judgment without such notice and opportunity to be heard is not a judicial determination of the rights of the party against whom it is rendered and is not entitled to respect in any court."

It has been repeatedly held that a void judgment may be assailed at any time in any court, either directly or collaterally, and may be set aside on motion made in the trial court at any time or term of court after its entry.

In Anderson v. Anderson, 49 Ill. App. 2d, the court said at p. 428:

"As to an attorney's power of [illegible] motion of attacking the v[illegible] judgment was by bill of review. It is [illegible] a decree or judgment [illegible] the person of the defendant, it is [illegible] expunged from the records of the court at any time. It is universally conceded that a void judgment or judgment on motion, irrespective of lapse of time. (Freeman on Judgments, 5th ed., sec. 93.) A court has no power to vacate a judgment or decree at any time [illegible] jurisdiction to enter such judgment or decree."

To the same effect is Lemon v. Miller, [illegible] Ill. App. 2d, [illegible] Ill. App. 2d, [illegible] asking any other than jurisdictional [illegible] appearance even though it is [illegible], holds that although defendant characterized his appearance as special and limited, it became a general appearance when waived the service of process upon him because his petition to vacate the void judgment, in addition to asking that such judgment be set aside, also prayed that "all supplementary proceeds be quashed and that the pending [illegible] be likewise quashed, and that petitioner may have such other and further relief as may be meet in the premises." This contention does not merit serious consideration. It is readily apparent that the only relief sought by appellee in his petition, other

than the vacation of the void revival judgment, was such as would naturally follow the setting aside of said void judgment. It clearly appears from appellee's petition that jurisdictional relief only was sought under his special appearance.

For the reasons stated herein the judgment order of the Municipal court of Chicago vacating the judgment of revival of August 25, 1944 is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

then the vacation of the void revival judgment, we must as would naturally follow the setting aside of said void judgment. It clearly appears from appellee's petition that jurisdictional relief only was sought under his special appearance.

For the reasons stated herein, the judgment order of the municipal court of Toledo vacating the judgment of revival of August 2, 1944 is affirmed.

JUDGMENT AFFIRMED.

Richard, P. J., and Gillum, J., concur.

43099

| | |
|---|---|
| R. M. GENIUS, JR., (Plaintiff) Appellee, v. ROBERT M. HOFFMAN et al., Defendants. | APPEAL FROM CIRCUIT COURT OF COOK COUNTY. |
| ROBERT M. HOFFMAN and EMILY POPE HOFFMAN, (Defendants) Appellants. | |

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

R. M. Genius, Jr., plaintiff, filed a complaint for an accounting against Robert M. Hoffman, Emily Pope Hoffman, his wife, et al., defendants, in which he charged defendant Robert M. Hoffman (1) with altering certain checks signed by plaintiff and made payable either to Hoffman or The Bergonize Company, Inc., and (2) with fraudulently filling in, to Hoffman's order for very substantial amounts without the authority or knowledge of Genius, certain other checks signed in blank by Genius for specific purposes. Emily Pope Hoffman was made a defendant for the sole reason that plaintiff sought to reach a joint bank account of Robert M. Hoffman and Emily Pope Hoffman. The other defendants are not concerned in this appeal. We will hereinafter refer to Robert M. Hoffman as the defendant.

The cause was tried by an able and experienced chancellor, Judge LaBuy. The amount of oral and documentary evidence that was presented upon the trial is shown by the fact that the abstract of record is in two volumes that total 680 pages, and there is an additional abstract of record filed by plaintiff that contains 195 pages. In deciding the case the chancellor delivered such an able and exhaustive opinion that we have

Judge Kelly. The amount of oral or documentary evidence that was presented upon the trial is shown by the fact that the abstract of record is in two volumes that total 600 pages, and there is an additional abstract of record filed by plaintiff that contains 197 pages. In deciding the case the chancellor delivered such an able and exhaustive opinion that we have

A decretal judgment was entered in favor of plaintiff and against Robert M. Hoffman in the sum of $120,770.33, from which judgment he appeals. Emily Pope Hoffman was erroneously joined with Robert M. Hoffman in the notice of appeal, although no final judgment was entered against her. Her appeal, therefore, must be dismissed.

Insert on p. 1 of Case 92 (abst.)
[43099]

A

Hazel:

Changes in opinion do not affect headnote. It is O.K.

M. M.

1/16/46.

concluded to incorporate it in full in our opinion. It reads as follows:

"OPINION.

"The complaint filed herein alleges that plaintiff and defendant were close friends and business associates from the fall of the year 1936 up to the latter part of December, 1942; that beginning on March 27, 1940, and ending on November 23, 1942, the defendant by a series of wrongful and fraudulent acts procured from plaintiff the sum of approximately $100,000.00; that the wrongful and fraudulent acts of defendant consisted of fraudulent alterations in checks given by plaintiff to defendant, and in the fraudulent filling in of blank checks entrusted by plaintiff to defendant to be filled in for certain specified amounts, the proceeds of which were to be used by the defendant for certain specified purposes which were agreed upon by the plaintiff and the defendant; that upon receiving the proceeds of these altered, raised and filled in checks signed by the plaintiff, the defendant wrongfully and fraudulently converted the proceeds of said checks to his own use; and that plaintiff did not learn of the alteration and raising, nor of the unauthorized filling in of said checks until December 29, 1942. Plaintiff seeks an accounting as to said sums fraudulently received by the defendant by means of such fraudulent devices, and seeks to have certain monies on deposit in certain defendant banks to be decreed to be the monies of plaintiff.

"The defendant in his answer to the complaint states that certain of the smaller checks set up in the complaint were given by plaintiff to the defendant to repay defendant for certain expenses paid out by defendant for the plaintiff. As to practically all of the balance of the checks, the

defendant alleges facts and circumstances which, when analyzed, amount to a claim that the amounts represented by the checks were given to the defendant by the plaintiff as gifts.

"The plaintiff replied that no gifts of monies represented by checks were made by plaintiff to defendant, and reiterated the charges of alteration and raising the amounts on certain checks and the fraudulent filling in of unauthorized amounts in checks signed by plaintiff in blank.

"Considerable oral and documentary evidence was presented upon the trial of this cause and the matter for decision by the court is whether certain checks have been altered or fraudulently filled in so that the defendant, Robert M. Hoffman, thus fraudulently came into possession of certain monies of plaintiff, without the consent of plaintiff.

"The disputed checks fall into two categories which are listed as to (1) raising, and (2) fraudulently filling in checks signed in blank by plaintiff and these different groups are listed as follows:

"Checks Claimed to Have Been Fraudulently Raised.

"All of these checks claimed by plaintiff to have been fraudulently raised and altered were all signed by the plaintiff and were all payable to defendant, the date of said checks, the amount of raising and Plaintiff's Exhibit No. being as follows:

| "Date | Amount of raising | Exhibit No. |
|---|---|---|
| February 27, 1940.... | $12.00 to $ 112.00 | 13 |
| March 27, 1940..... | 19.00 to 219.00 | 16 |
| April 9, 1940..... | 86.50 to 486.50 | 17 |
| April 10, 1940..... | 30.00 to 630.00 | 18 |
| April 12, 1940..... | 5.00 to 205.00 | 19 |
| May 15, 1940..... | 20.00 to 920.00 | 20 |
| June 8, 1940..... | 31.00 to 3031.00 | 21 |
| July 18, 1940..... | 15.05 to 6115.05 | 22 |

"Checks Claimed to Have Been Fraudulently Filled in by Defendant without Consent of Plaintiff.

"All of these checks which it is claimed by plaintiff to have been fraudulently filled in with amounts not agreed to by plaintiff, were signed by plaintiff and were all payable to defendant, the date of said checks, the amount thereof and Plaintiff's Exhibit No. were offered in evidence being as follows:

| "Date | Amount | Exhibit No. |
|---|---|---|
| September 6, 1940 | $ 7608.00 | No exhibit |
| October 29, 1940 | 12500.00 | 23 |
| March 5, 1941 | 9825.00 | 24 |
| May 29, 1941 | 8250.00 | 25 |
| July 26, 1941 | 7500.00 | 26 |
| November 1, 1941 | 9250.00 | 27 |
| December 1, 1941 | 3250.00 | 28 |
| February 10, 1942 | 7750.00 | 32 |
| March 6, 1942 | 3950.00 | 29 |
| May 1, 1942 | 5050.00 | 30 |
| July 2, 1942 | 7500.00 | 31 |
| August 15, 1942 | 2250.00 | 33 |
| September 28, 1942 | 5250.00 | 34 |
| November 23, 1942 | 7250.00 | 35 |

"The Alleged Inheritance.

"Since this cause was tried, the court has read all of the transcript of the testimony and has examined each one of the exhibits which was received in evidence herein. After considering all of such evidence, oral and documentary, the court is of the opinion that the testimony of the defendant, Hoffman, with reference to the alleged inheritance which Genius is supposed to have agreed to give to said defendant, is not to be believed. The court does not credit or believe the testimony of Hoffman on this question, and is impelled to such conclusion for the following reasons:

"(1) The relationship between Genius and Hoffman was on a mixed business and social plane, but neither the social nor the business relationship between the parties was of such a nature as to warrant Genius making an outright gift of $150,000.00 to Hoffman.

[illegible]

"(2) The agreement for the inheritance is supposed to have been made during a walk on Boston Commons that Genius and Hoffman took some time before May 15, 1940. This is the date of Plaintiff's Exhibit 20, which is a check for $920.00, which Hoffman claims was the first payment made by Genius on the inheritance. However, there is no evidence in this record by way of letter, written agreement or by verbal conversation with any person in which Genius stated his intention to give $150,000.00 to Hoffman.

"(3) The correspondence between Genius and Hoffman while upon a friendly basis was never on an affectionate basis. The letters between the parties while containing personal references from time to time, never at any time contained any statements from which it could be inferred that Genius ever had any thought in his mind with reference to making a gift of a large sum of money to Hoffman, and there is no statement by Hoffman in any of said letters which justifies the belief that Hoffman ever expected any such gift from Genius. An examination of Defendant's Exhibit 237, which is a letter from Genius to Hoffman dated about April 15, 1940, and of Defendant's Exhibit 239, which is a copy of a letter from Hoffman to Genius dated April 20, 1940, which letters were between the parties a short time before the supposed agreement was made in Boston, shows no reference to the alleged inheritance. These letters show that no thought of any inheritance was in the minds of either Genius or Hoffman, a very short time before the date of the supposed agreement for the inheritance was made in Boston. Also, whenever Genius made any agreement with Hoffman, it was reduced to writing. (Plaintiff's Exhibits 3, 4.)

"(4) After the date of the supposed agreement for the inheritance made in Boston, there is not a single letter, memorandum or other written evidence which mentions the supposed

"(3) The agreement for the inheritance is supposed to have been made [illegible] between Gaines and Hoffman soon [illegible] Feb. 11th in the [illegible] of Plaintiff's [illegible], which is [illegible] Hoffman claims to be [illegible] made on the [illegible] instrument. However, there is no evidence in the record [illegible] any of Gaines, [illegible] or [illegible] investigation with any person in which [illegible] to Gaines.

"(4) The correspondence between Gaines and Hoffman, while upon a friendly basis [illegible] on a [illegible] to [illegible], the letters between the parties [illegible] [illegible] inheritance from time to time, [illegible] [illegible] inheritance from which [illegible] [illegible] [illegible] [illegible] large sum of money to [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of defendants, [illegible] [illegible] [illegible] Hoffman dated about April 11, 1944, and [illegible] 1944, which is a copy of a [illegible] April 2, 1940, which letters were [illegible] time before the [illegible] agreement was made in Boston, also no reference to the alleged inheritance. These letters show that no thought of any inheritance was in [illegible] of either Gaines or Hoffman, a very short time before [illegible] date of the supposed agreement for the inheritance was made in Boston. Also, whenever Gaines made any agreement with Hoffman, it was reduced to writing. (Plaintiff's Exhibits 2, 4.)

"(4) After the date of the supposed agreement for the inheritance made in Boston, there is not a single letter, memorandum or other written evidence which mentions the supposed

agreement for the inheritance between Genius and Hoffman. An examination of the letters between the parties shows that they discussed in these letters practically every subject in which they were jointly interested, but the subject of said inheritance is never mentioned in any letter, telegram or other scrap of paper between the parties. Also, there is no evidence that Genius ever discusssed the supposed inheritance in the presence of any witness, not even Mrs. Hoffman, who certainly should have known of the large sums of money that her husband was receiving, and the source thereof, if Hoffman was receiving legitimately the large sums of money that are represented by the checks of Genius deposited in the bank account of Hoffman.

"(5) The checks that were made out by Mrs. Brogan [secretary and bookkeeper of The Bergonize Company], as shown by her check stubs, and which were never put through the bank, show that they were made out for the signature of Genius but that for some reason they were never signed. The fact that these checks were never used lends credence to the claim that other checks for the large amounts were later substituted and the checks for the small amounts suppressed.

"(6) None of the check stubs which were kept by Mrs. Brogan show that any entry on these stubs was made for the issuance of any of the 'inheritance' checks to Hoffman. These check stubs show as follows:

"(a) Plaintiff's Exhibit 60 bears serial number D-1-2876, and there are several check stubs in the folder which were not filled out by Mrs. Brogan. The check for $9825.00 dated March 5, 1941, bears the serial number of D-1-2876, and there is no entry on any stub in this check folder showing the issuance of this check.

"(b) Plaintiff's Exhibit 61 bears serial number D-1-6259. There is only one unfilled stub in this folder (the last one), and there is only one 'inheritance' check which bears serial number D-1-6259, same being the check for $5050.00 dated May 2, 1942. There is no record in the stub book as to the issuance of the check for $5050.00.

"(c) Plaintiff's Exhibit 62 bears serial number D-1-4183. There is only one stub in this folder which is not filled out (the last one), and this stub bears the legend 'not in book when I rec'd it. M. Brogan.' This check was evidently abstracted from the check folder prior to being received by Mrs. Brogan, and subsequently this abstracted check appears signed by Genius to Hoffman for $8250.00. (Check of May 29, 1941.)

"(d) Plaintiff's Exhibit 64 bears serial number D-1-8243. The stubs in this folder are all filled out and no 'inheritance' checks appear with the serial number D-1-8243.

"(e) Plaintiff's Exhibit 65 bears serial number D-1-6260. There are five stubs in this folder which are not filled out and bear no notation. Four of the 'inheritance' checks (the one for $3250.00 dated December 1, 1941, the one for $7750.00, dated February 10, 1942, the one for $3950.00 dated March 6, 1942, and the one for $7500.00 dated July 2, 1942) bear the serial number D-1-6260. The check stubs show that the checks from this check folder were dated from December 4, 1941 (the date of the first stub) until March 5, 1942, (the date of the last stub that is filled out).

"All of the unfilled stubs appear at the end of this stub folder, while the 'inheritance' check for $3250.00 is dated December 1, 1941, which is prior to the date of any check issued in the book and the date of the last 'inheritance' check issued from this folder was July 2, 1942, (the check for

"(b) Plaintiff's exhibit of book serial number D-I-6292. There is only one unfilled stub in this folder (the last one), and there is only one 'inheritance' check which bears serial number D-I-6292, same being the check for $2250.00 dated July 2, 1942. There is no number in the stub book as to the issuance of the check for $2250.00.

"(c) Plaintiff's exhibit of book serial number D-I-4183. There is only one stub in this folder which is not filled out (the last one), and this stub bears the figure 'zero' in book when I read it. A 'program' check was evidently abstracted from the check folder prior to being received by Mrs. Hogan, and subsequently was substituted check as signed by Dallas to Hoffman for $2250. (Check of May 29, 1941.)

"(d) Plaintiff's exhibit of book serial number D-I-8241. The stubs in this folder are all filled out, no 'inheritance' checks appear, left the serial number D-I-8241.

"(e) Plaintiff's exhibit 6, book serial number D-I-6[illegible]. There are five stubs in this folder which are not filled out and bear no notation. Four of the 'inheritance' checks (the one for $2250.00 dated December 1, 1941, the one for $[illegible], dated October 10, 1941, the one for $2250.00 dated [illegible], 1941, and the one for $2250.00 dated July [illegible], 1941) bear the serial number D-I-6[illegible]. The check stubs show that the checks from this check folder were dated from December 1, 1941 (the date of the first stub) until March 3, 1942, (the date of the last stub that is filled out).

"All of the unfilled stubs appear at the end of this stub folder, while the 'inheritance' check for $2250.00 is dated December 1, 1941, which is prior to the date of any check issued in the book and the date of the last 'inheritance' check issued from this folder was July 2, 1942, (the check for

$7500.00). This check for $7500.00 is dated a considerable period of time subsequent to the date of the last filled in stub in said folder (March 5, 1942). If there was a check stub folder for checks issued between March 5, 1942, and October 8, 1942, the date of the first stub in Plaintiff's Exhibit 66, same was not offered in evidence.

"(f) Plaintiff's Exhibit 66 bears serial number D-1-8242. No 'inheritance' checks were issued bearing that serial number, and every check stub in this folder is filled out with the exception of one (the fifteenth stub in said folder) which bears the legend 'check for R. M. Genius, 12-9-42.' The stub with this notation is between a stub dated December 8, 1942, and one dated December 16, 1942. No 'inheritance' checks were issued after November 23, 1942, so that this unfilled stub is satisfactorily accounted for.

"(g) The check for $12,500.00 dated October 29, 1940, bears serial number D-1-2875. This check folder does not appear to have been used by Mrs. Brogan. The only checks bearing this said serial number which were received in evidence were the said check for $12,500.00 and three checks dated October 8, 1940, (Plaintiff's Exhibits 293, 295 and 296). These three checks were all for personal expenses of Genius and Hoffman testified (Trans. 491) that at the time the $12,500.00 check was signed two or three other checks were signed.

"(h) The check for $7500.00 dated July 26, 1941, and the check for $9250 dated November 1, 1941, both bear the serial number D-1-4184, and there is no check stub folder received in evidence having this serial number. When the check dated July 26, 1941, was issued check stub book (Plaintiff's Exhibit 62) was still in use as the date of the last stub in this folder is August 19, 1941.

"(i) The 'inheritance' checks for $2250 dated August

[illegible] dated August 19, 1942.

"(i) The 'Inheritance' check for [illegible] dated August 19, 1942, is a issued March stub book (Liberty [illegible] was still in use as the date of the last stub in this folder is August 19, 1942.

"(j) The 'Inheritance' check for [illegible] dated August

15, 1942, for $5250 dated September 29, 1942, and for $7250.00 dated November 23, 1942, all bear serial number D-1-8244. No other checks received in evidence bear the same serial number as these three checks. Plaintiff's Exhibit 64 bearing serial number D-1-8243 shows check stubs dated up to October 5, 1942, which covers the period in which the checks above listed dated August 15, 1942, and September 29, 1942, were issued; and Plaintiff's Exhibit 66 bearing serial number D-1-8242, shows checks issued from October 8, 1942, through January 12, 1943, which includes the period in which the check above listed dated November 23, 1942, was issued. This shows that someone had picked up from the Continental Bank check folder number 8244, which is the one following 8243 (Plaintiff's Exhibit 64).

"Summarizing the above, whenever an 'inheritance' check was issued it was issued on a check of which no record was kept by Mrs. Brogan on the stubs. Whenever an 'inheritance' check was issued the check stub is not filled out, and when the check is filled out on a serial number not bearing the number of any stub record kept by Mrs. Brogan, the serial number is preceding or following number to the serial numbers on the check folders used by Mrs. Brogan. This indicates a purpose and intention on the part of Hoffman to conceal (even from Mrs. Brogan) the issuance of these 'inheritance' checks. There is a furtiveness and air of suspicion about the issuance of these checks which illy accords with a forthright purpose and intention on the part of Hoffman of handling a legitimate transaction with Genius.

"(7) Because the court is of the opinion, as hereinafter set forth more at length, that Hoffman has wilfully and knowingly sworn falsely on the hearing of this cause, on a material fact in this cause, with reference to the raising of certain checks which testimony of Hoffman has not been

15, 1942, for $[illegible]50 dated September [illegible], 1942, and for $[illegible]00 dated November 23, 1942, all b[illegible] serial number [illegible]-1-8244. No other checks received in evidence bear the same serial number as these three checks. [illegible] exhibit [illegible] serial number [illegible]-1-8242 shows check stubs [illegible] up to October [illegible], 1942, which covers the period in which [illegible] checks above listed [illegible] August 15, 1942, and September [illegible], 1942, [illegible] is [illegible]; and Plaintiff's exhibit [illegible] serial number [illegible]-1-[illegible], shows checks issued from October 8, 1942, through [illegible] 1, 1942, which includes the period in which the check above listed dated November [illegible], 1942, [illegible] is issued. It shows that [illegible] had picked up from the counter [illegible] 1 [illegible] of the following number 8244, which is the one following [illegible] 1 [illegible] it [illegible].

"Immediately the above [illegible] check was issued it was [illegible] on the stub of [illegible] no record was kept by Mrs. Brogan on the stubs. However on the [illegible] check was issued the check stub [illegible] was filled out, and when the check is filled out on a serial number [illegible] the number of any stub record kept by Mrs. Brogan, the serial number is preceding or following number to the serial numbers on the check forms used by Mrs. Brogan. This indicates a purpose and intention on the part of Hoffman to conceal (even from Mrs. Brogan) the issuance of these 'immaterial' checks. There is a furtiveness and air of evasion about the issuance of these checks which fully accords with a fraudulent purpose and intention on the part of Hoffman of hamming a legitimate transaction with Genina.

"(7) Because the court is of the opinion, as hereinafter set forth more at length, that Hoffman has willfully and knowingly sworn falsely on the hearing of this cause, on a material fact in this cause, with reference to the raising of certain checks which testimony of Hoffman has not been

corroborated herein by other credible evidence. Therefore, the rule falsus in uno, falsus in omnibus applies herein.

"(8) Because the idea imputed to Genius by Hoffman, that Genius desired to marry a nice girl and bring up a family, is repugnant to the thought that Genius was giving away $150,000 to Hoffman. The natural inclination of Genius would be to save his money and possessions for his future wife and family, and not dispense it to a stranger who had never done anything for him except entertain him socially and induce him to invest a considerable sum of money in Hoffman's Bergonize Company, an enterprise which is and has been admittedly insolvent since the time that Genius invested his money therein. There are no facts apparent in this record which would justify the thought that Genius was so grateful to Hoffman that he would voluntarily turn over as a free gift to Hoffman the large sum of $150,000.00. If Hoffman was assisting Genius in his efforts to meet some nice girl that Genius would marry, Hoffman's efforts in that direction proved fruitless. The court feels that Hoffman 'went along' with Genius in the matter, in order to influence Genius to invest money in the Bergonize Company; that Hoffman did influence Genius to invest sums of money in said Company through the apparent co-operation of Hoffman with Genius in these endeavors; but that Genius never reached the point where he even considered turning over $150,000.00 to Hoffman.

"(9) Because there are numerous discrepancies in the testimony of Hoffman in this cause, such as (1) the apparent contradictions between the explanation he gave as to several of the disputed checks on his pre-trial deposition, and the explanation he gave on the same items in his testimony before this court, (2) his confessed inability to account for the amounts of some of the checks which it is claimed by plaintiff were raised, and which Hoffman claimed were given to him by

Genius for expenses, (3) and other discrepancies which the court will not seek to enumerate.

"(10) The character and demeanor of the witness, Hoffman, while testifying herein impressed the court that he was not telling the truth about the transactions in controversy.

"(11) The court was impressed with the reasonableness of the story of the plaintiff as related on the witness stand, and believes that said witness told the truth.

"(12) The court is impressed with the testimony of the witnesses for the plaintiff and believes from a consideration of all the evidence herein that Genius has sustained his claims against Hoffman on the question of the so called 'inheritance.'

"The Raised or Altered Checks.

"Upon consideration of all of the testimony in this cause including the testimony of the handwriting experts and a close examination of each of the checks themselves together with the enlargements thereof, the court is of the opinion that it has not been sufficiently proved that the check dated February 27, 1940, for $112.00 (Plaintiff's Exhibit 13) was raised from $12.00 to $112.00, and that it has not been sufficiently proved that the check dated March 27, 1940 for $219.00 (Plaintiff's Exhibit 16) was raised from $19.00 to $219.00.

"With reference to the check dated April 9, 1940, for $486.50 (Plaintiff's Exhibit 17), the court is convinced that this check was raised from $86.50 to $486.50. The court reached this conclusion for the following reasons:

"(a) In the figures $486.50, the '4' is out of alignment with the $86.50, and apparently was written at a time different than the writing of the figure $86.50.

"(b) In the words 'Four hundred eighty-six and 50/x' the words 'eighty six and 50/x' are in perfect alignment and were apparently written prior to the words 'Four hundred'.

There is quite a space between the 'hundred' and the 'eighty', and it is apparent that the person writing the words 'Four hundred' was spacing the letters of these words with much wider spacing than the words 'eighty-six and 50/x'. The letters in the words 'eighty six and 50/x' are spaced evenly and rather close together as compared with the wide spacing of the words 'Four hundred'. The person who added the words 'Four hundred' after the words 'eighty-six and 50/x' had been written, made a bad guess as to the necessary spacing for the words 'Four hundred' and as the check could not be rewritten had to do the best he could. He thus attempted to stretch out the letters in the words 'Four hundred' so that it would appear that the words 'Four hundred eighty six and 50/x' had all been written at the same time.

"(c) The words 'Four hundred' are lighter ink than the balance of the check.

"(d) Hoffman claimed that this check was given to him by Genius for expenses, but on cross examination could not justify or explain any indebtedness that Genius owed to The Bergonize Company for the $400.00 added to the $86.50 for which this check was originally issued.

"Inasmuch as it is admitted that all of the handwriting on this check is in the handwriting of Hoffman, the court concludes that said Hoffman fraudulently and wilfully altered and raised this check from $86.50 to $486.50 without the knowledge or consent of the plaintiff.

"With reference to the check dated April 10, 1940 for $630.00 (Plaintiff's Exhibit 18), the court is convinced that this check was raised from $30 to $630.00. The court reaches this conclusion for the following reasons:

"(a) In the figures '630 00/x' the figure '6' is in

There is quite a space between the 'Hundred' and the [illegible], and it is apparent that the person writing the words 'Four Hundred' was spacing the letters of these words [illegible] wider spacing than the words 'and [illegible]'. The letters in the words 'Hundred' and [illegible] appeared evenly and rather close together as compared [illegible] of the words 'Four Hundred'. The person who wrote the words 'Four Hundred' after the [illegible] and in a written, made a bad [illegible] the words 'Four Hundred' and [illegible] had to do the best he could. [illegible] to [illegible] out the letters in the words 'Four Hundred' so that [illegible] all the words 'Four Hundred' [illegible] all been written at the same time.

"(c) [illegible] the balance of the check.

"(d) Negligence of kind [illegible] by banks for payment [illegible] identity or capacity of payee [illegible] forgeries. [illegible] this check was originally issued.

"Inasmuch as it is admitted that all of the handwriting on this check is in the handwriting of Mobley, the bank contends that said Hoffman fraudulently and deceitfully altered and raised this check from $[illegible] to $[illegible] without the knowledge or consent of the plaintiff.

"With reference to the check dated April 10, 1960 for $630.00 (Plaintiff's Exhibit 18), the court is convinced that this check was raised from $30 to $630.00. The court reaches this conclusion for the following reasons:

"(a) In the figures '$30.00' the figure '3' is in

heavier ink than the '30 00/x' and is out of alignment with the said '30 00x'.

"(b) The words 'Six hundred' of the words 'Six hundred thirty and no/x' are in heavier ink than the 'thirty and no/x'; the down and flourish stroke at the end of the letter 'd' of the word 'hundred' runs over and touches the down stroke of the letter 't' of the word 'thirty'; and the letters of the word 'Six hundred' are closer spaced than the letters of the words 'thirty and no/x'.

"(c) This check is explained by Hoffman as a contribution or gift by Genius to him to settle a certain so called Buffington claim. The court has considered the testimony on this question and is convinced that the Buffington claim was in excess of $630.00 and that this check was not given by Genius as a gift to settle the Buffington claim.

"Inasmuch as it is admitted that all of the handwriting on this check is in the handwriting of Hoffman, the court concludes that said Hoffman fraudulently and wilfully altered and raised this check from $30.00 to $630.00 without the knowledge or consent of the plaintiff.

"With reference to the check dated April 12, 1940 for $205.00 (Plaintiff's exhibit 19), the court is convinced that this check was raised from $5.00 to $205.00. The court reached this conclusion for the following reasons:

"(a) The '2' of the figures '205.00' has been written over the $ sign on the check. Also, the '2' and the '0' are upright in their strokes while the '5' slants to the right (as you look at the check). It is apparent that the '2' and the '0' have been crowded in with very little space between the '$' and the '5'. Also the '2' and the '0' are in darker ink than the '5', the '5' being in much paler ink.

heavier ink than the '50 00/x' and is out of alignment with the said '50 00x'.

"(b) The words 'six hundred' of the words 'six hundred thirty and no/x' are in heavier ink than the 'thirty and no/x'; the loops and flourish strokes at the end of the letter 'd' of the word 'hundred' [illegible] and overlaps the loops strokes of the letter 'd' of the word 'thirty'; and the letters of the word 'six hundred' are slanted [illegible] than the letters of the word 'thirty and no/x'.

"(c) Ink stroke is [illegible] by [illegible] continuation or lift by [illegible] to a [illegible] [illegible] called [illegible] ink [illegible]. [illegible] the testimony on this question [illegible] the Huntington National Bank in an effort [illegible] check was not given by [illegible] the Huntington National.

In [illegible] as to [illegible] handwriting on this check is in the [illegible], the court concluded [illegible] altered and reduced this check from [illegible] without the knowledge or consent of the [illegible].

"With reference to the [illegible] for $600.00 (Pl Inst's exhibit [illegible]), [illegible] that this check was [illegible] from [illegible] $600.00. The court reached this conclusion for the following reasons:

"(a) The '6' of the figures '600.00' has been written over the 4 sign on the check. Also, the '6' and the '0' are upright in their strokes while the '4' slants to the right (as you look at the check). It is apparent that the '2' and the '0' have been crowded in with very little space between the '4' and the '5'. Also the '2' and the '0' are in darker ink than the '5', the '5' being in much paler ink.

"(b) The 'Two hundred' of the words 'Two hundred five and no/x' are in darker ink than the 'five and no/x'. The down stroke and the flourish stroke at the end of the letter 'd' in the word hundred is written in very much darker ink than the ink of the 'five' immediately following. The spacing between the words 'hundred' and 'five' is different than between the words 'two' and 'hundred' and between 'five' and 'and'.

"(c) The writing of the words 'Two hundred five and no/x' does not appear continuous but there seems to be a break between the words 'hundred' and 'five'.

"(d) The explanation of Hoffman with reference to this check being for expenses is unsatisfactory to the court and the court does not believe such explanation.

"Inasmuch as it is admitted that all of the handwriting on this check is in the handwriting of Hoffman, the court concludes that said Hoffman fraudulently and wilfully altered and raised this check from $5.00 to $205.00 without the knowledge or consent of the plaintiff.

"With reference to the check dated May 15, 1940, (Plaintiff's Exhibit 20) the court is convinced that this check was raised from $20 to $920.00. The court reaches this conclusion for the following reasons:

"(a) The '9' of the '920' is in darker ink than the '20'. The '9' is straighter while the '20' slants a trifle to the right.

"(b) The 'nine hundred' of the words 'nine hundred twenty and no/x' is in lighter ink than the words 'twenty and no/x'.

"(c) Hoffman claims that this check was given by Genius as a part of the 'inheritance'. The court has determined that there is no justification for such claim.

"(b) The 'Two hundred' of the words 'Two hundred five and no/x' are in darker ink than the 'five and no/x'. The down stroke and the flourish stroke at the end of the letter 'd' in the word hundred is visible in very much darker ink than the ink of the 'five' [illegible] 'nothing'. The spacing between the words 'hundred' and 'five' is different than between the words 'two' and 'hundred' and between 'five' and 'and'.

"(c) The writing of the words 'Two hundred five and no/x' does not appear continuous but there seems to be a break between the words 'hundred' and 'five'.

"(d) The explanation of Hoffman [illegible] reason for this change in the [illegible] is [illegible] to the court and the court does not believe such a [illegible].

"Inasmuch as it is admitted that all of the handwriting on this check is in the handwriting of Hoffman, the court concludes that said Hoffman [illegible] altered and raised this check from $[illegible] to $[illegible] without the knowledge or consent of the [illegible].

"With reference to the [illegible], 1946, (Plaintiff's Exhibit 10) the court is convinced that this check was raised from $20 to $[illegible]. The court [illegible] this conclusion for the following reasons:

"(a) The '0' of the '020' is in darker ink than the '20'. The '0' is straighter while the '2' slants a trifle to the right.

"(b) The 'nine hundred' of the words 'nine hundred twenty and no/x' is in lighter ink than the words 'twenty and no/x'.

"(c) Hoffman claims that this check was given by Cecilia as a part of the 'inheritance'. The court has determined that there is no justification for such claim.

"Inasmuch as it is admitted that all of the handwriting of this check is in the handwriting of Hoffman, the court concludes that said Hoffman fraudulently and wilfully altered and raised this check from $20.00 to $920.00 without the knowledge or consent of the plaintiff.

"With reference to the check dated June 8, 1940, for $3031.00, (Plaintiff's Exhibit 21) the court is convinced that this check was raised from $31.00 to $3031.00. The court reaches this conclusion for the following reasons:

"(a) The '30' of the figures '3031' is out of alignment with the '31', and is in lighter ink than the '31 no/x'.

"(b) The 'Three thousand' of the words 'Three thousand thirty one and no/x' is in lighter ink than the words 'thirty one and no/x'. The spacing between the word 'thousand' and the word 'thirty' is closer and dissimilar to the spacing between the words 'Three' and 'thousand' and 'thirty' and 'one'.

"(c) Hoffman claims that this check was given by Genius as part of the inheritance. The court has determined that there is no justification for such claim.

"Inasmuch as it is admitted that all of the handwriting on this check is in the handwriting of Hoffman, the court concludes that said Hoffman fraudulently and wilfully altered and raised this check from $31.00 to $3031.00, without the knowledge or consent of the plaintiff.

"With reference to the check dated July 18, 1940, (Plaintiff's Exhibit 22), the court is convinced that this check was raised from $15.05 to $6115.05. The court reaches this conclusion for the following reasons:

"(a) The '61' of the figures '$6115.05' is distinctly lighter in color than the $15.05. The manner of making the first '1' in the '$6115.05' is different from the second '1' of said

Therefore as it is [illegible] that all of the handwriting of this check is in the [illegible] of Lottman, the court [illegible] that said Lottman [illegible] and [illegible] altered and raised this check from [illegible] to $[illegible], without the knowledge or consent of the plaintiff.

With reference to the [illegible], [illegible], [illegible] and it is in the court is convinced that this check [illegible] the court [illegible] conclusion for the following reasons:

"(a) The '1' of the figure '$[illegible]' is [illegible] than the second '1' of said [illegible] the '$[illegible]' [illegible] the '1' [illegible] the '$[illegible]'.

"(b) The 'Three Hundred' of the [illegible] 'one' and 'no/x'. The [illegible] 'one' and 'no/x'. The [illegible] the word 'thirty' is [illegible] between the [illegible] 'three' and [illegible] 'one'.

"(c) [illegible] of the [illegible] is [illegible] that there is no [illegible] of doubt.

Therefore as it is [illegible] on this check by the [illegible] of the [illegible] clause that said Lottman [illegible] altered and raised this check from [illegible] to $[illegible], without the knowledge or consent of the plaintiff.

With reference to the [illegible] (Plaintiff's Exhibit [illegible]), the court is convinced that this check was raised from $[illegible] to $[illegible]. The court [illegible] this conclusion for the following reasons:

"(a) The '1' of the figures '$[illegible]' is distinctly lighter in color than the $[illegible]. The manner of making the first '1' in the '$[illegible]' is different from the second '1' of said

figures. The first '1' was written with a different pen than the second '1' as the ink in the first '1' has spread and the second '1' is made firmly without the ink spreading.

"(b) the words 'Six thousand one hundred' of the words 'Six thousand one hundred fifteen and 05/x' are written in much lighter ink than the words 'fifteen and 05/x'. The spacing between these words is different. It appears that the person who wrote the words 'Six thousand one hundred' was attempting to fill out the space between the margin of the check and the word 'fifteen,' and after writing the words 'Six thousand one' closely spaced there was too much space between the 'one' and the 'fifteen' for the word 'Hundred' to be inserted with the same spacing so the person writing same left a much larger spacing between the word 'one' and the word 'hundred' in an attempt to fill it in symmetrically. In this the person failed as it is not symmetrical and shows that the words 'Six thousand one hundred' were written after the words 'fifteen and 05/x' had been written on said check.

"(c) Hoffman claims that this check was given by Genius as a part of the 'inheritance.' The court has determined that there is no justification for such claim.

"Inasmuch as it is admitted that all of the handwriting on this check is in the handwriting of Hoffman, the court concludes that said Hoffman fraudulently and wilfully altered and raised this check from $15.05 to $6115.05, without the knowledge or consent of the plaintiff.

"<u>The missing check for $7608.00.</u>

"There was one check for $7608 which was dated about September 6, 1940, for $7608.00. The original check is missing and was not offered in evidence herein. Inasmuch as this check was not produced, the court cannot determine whether this check was altered or raised, but inasmuch as the only claim that

Hoffman makes with reference to this check is that it was given on account of the 'inheritance,' the court holds that the defendant Hoffman fraudulently procured this check for $7608 and that the liability of the defendant herein should include the amount of this check.

"Conclusion.

"The court is convinced from all of the testimony in this case that the defendant, Hoffman, set out upon a plan with the purpose of defrauding the plaintiff; that the fraud first took the form of raising checks for comparatively small amounts and as these checks went through the bank without any complaint from Genius, Hoffman considered himself safe from discovery and gradually increased the amount of the raising until he finally raised one check from $31.00 to $3031.00 and one from $15.05 to $6115.05. Hoffman no longer fearing discovery and feeling that Genius was very negligent with reference to checks and money matters imposed upon the confidence of the plaintiff and induced the plaintiff to sign a number of checks in blank. These checks were later filled out by Hoffman on a typewriter and protectograph for large amounts, and this continued until the plaintiff discovered these frauds and instituted this suit. Having no possible claim to all of this money which he had fraudulently abstracted from the bank account of Genius, Hoffman invented the story of an 'inheritance' that Genius was to give him as a reason for the receipt by him of these sums approximating the sum of $100,000.00. This claim of an 'inheritance' is absolutely unfounded in the opinion of the court and is a continuation of the fraud which Hoffman practiced upon Genius.

"The court, therefore, finds that the plaintiff is entitled to recover against the defendant Hoffman for the following:

Hoffman makes with reference to this check is that it was given on account of the 'inheritance,' the court holds that the defendant Hoffman fraudulently procured this check for $7608 and that the liability of the defendant herein should include the amount of this check.

"Conclusion.

"The court is convinced from all of the testimony in this case that the defendant, Hoffman, set out upon a plan with the purpose of defrauding the plaintiff and the fraud first took the form of taking checks for comparatively small amounts and as these checks went through the bank without any complaint from anyone, Hoffman could feel reasonably safe from discovery and gradually increased the amount of the checking until he finally raised one check from $[illegible] to $[illegible] and one from $[illegible] to $[illegible]. Hoffman no longer to risk discovery and feeling that [illegible] was a very negligent with reference to checks and money, [illegible] upon the confidence of the plaintiff and induced the plaintiff to sign a number of checks in blank. These checks were later filled out by Hoffman on a typewriter and photographs for large amounts, and this continued until the plaintiff discovered these frauds and instituted this suit. Having no possible claim to all of this money which he had fraudulently abstracted from the bank account of Gemina, Hoffman invented the story of an 'inheritance' that Gemina was to give him as a reason for the receipt by him of these sums aggregating the sum of $100,000.00. This claim of an 'inheritance' is absolutely unfounded in the opinion of the court and is a continuation of the fraud which Hoffman practiced upon Gemina.

"The court, therefore, finds that the plaintiff is entitled to recover against the defendant Hoffman for the following:

"On Raised Checks.

| "Date of check | Amount raised |
|---|---|
| April 9, 1940 | $ 400.00 |
| April 10, 1940 | 600.00 |
| April 12, 1940 | 200.00 |
| May 15, 1940 | 900.00 |
| June 8, 1940 | 3000.00 |
| July 18, 1940 | 6100.00 |

"On Filled in Checks.

| "Date of check | Amount filled in |
|---|---|
| September 6, 1940 | $ 7608.00 |
| October 29, 1940 | 12500.00 |
| March 5, 1941 | 9825.00 |
| May 29, 1941 | 8250.00 |
| July 26, 1941 | 7500.00 |
| November 1, 1941 | 9250.00 |
| December 1, 1941 | 3250.00 |
| February 10, 1942 | 7750.00 |
| March 6, 1942 | 3950.00 |
| May 1, 1942 | 5050.00 |
| July 2, 1942 | 7500.00 |
| August 15, 1942 | 2250.00 |
| September 28, 1942 | 5250.00 |
| November 23, 1942 | 7250.00 |

"The total of all of the above items is the sum of $108,383.00, which sum the court holds was unlawfully and fraudulently procured by the defendant, Hoffman, from the plaintiff without the knowledge or consent of said plaintiff. A decree may be prepared in accordance with the findings expressed in this opinion."

After the chancellor had delivered his opinion defendant filed a lengthy written motion to re-open the case and set it down for re-argument, and attached to the motion is an affidavit of one Schwartz, a "graphologist" expert, who had testified for defendant upon the hearing. This affidavit amounts to a criticism of the reasons advanced by the chancellor for his findings as to the alleged raised checks. The chancellor then filed a written opinion denying the motion, and giving his reasons for so doing. Robert M. Hoffman and his wife appeal from the decree that was entered.

In meeting the evidence that supports the serious

"Cumulative Income.

| "Date of check | Amount paid |
|---|---|
| April 1, 1940 | [illegible] |
| April 15, 1940 | [illegible] |
| April 15, 1940 | [illegible] |
| May 1, 1940 | [illegible] |
| June 1, 1940 | [illegible] |
| July 1, 1940 | [illegible] |

"Non Alimony Income.

| Date of check | Amount paid |
|---|---|
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |
| [illegible] | [illegible] |

"The total of all of the above items is the sum of $108,382.00, which was the sum which defendant fraudulently procured by the decree of [illegible], from the plaintiff. Inform the [illegible] of a [illegible] plaintiff, a decree may be prepared in accordance [illegible] findings expressed in this opinion."

After the above [illegible] filed an opinion defendant filed a lengthy written motion to re-open the case and set it down for re-hearing, and in support of the motion he submitted affidavit of one [illegible], a "psychologist" [illegible], who had testified for defendant upon the hearing. This affidavit amounts to a criticism of the reasons advanced by the chancellor for his findings as to the alleged mental cruelty. The chancellor then filed a written opinion denying the motion, and giving his reasons for so doing. Robert K. Heffran and his wife appeal from the decree that was entered.

In meeting the evidence that supports the serious

charges against defendant his counsel have shown industry, ingenuity and great courage, and, sometimes, in their zeal, have inadvertently misquoted the evidence and assumed facts that find no support in the transcript of the evidence.

After a painstaking study of the evidence we are so impressed with the fairness of the chancellor's findings and conclusions upon the material questions of fact that we feel that we would be justified in concluding our opinion with an unqualified approval of his opinion and without any comment upon the evidence. However, we have decided to make a few references and comments upon certain parts of the evidence:

It is significant that before defendant succeeded in getting plaintiff to invest in the Bergonize Company he and his wife, in 1938, had asked plaintiff to loan defendant $20,000 to enable him to buy a newspaper in a small town in Oklahoma and that plaintiff had firmly told them that such a loan was out of the question. That Hoffman's financial condition did not justify such a loan from a business standpoint cannot be reasonably disputed. Defendant was dissatisfied with the amount that plaintiff invested in the Bergonize Company. Quasi honest methods to obtain money from plaintiff having failed to obtain from him an amount sufficient to satisfy defendant, criminal methods to obtain money from plaintiff followed, and it is our considered opinion that the evidence proves clearly this scheme to defraud plaintiff. The fact that the latter was defendant's benefactor aggravates the offense. Plaintiff was a nervous, diffident man, with an inferiority complex. He was very wealthy, through inheritance. Defendant stated that he knew that plaintiff had plenty of money in the bank, and the evidence shows that he knew that plaintiff carried a large bank balance and that he was grossly

charges against defendant he counsel have shown industry, ingenuity and great courage, and, sometimes, in their zeal, have inadvertently adopted the evidence as accepted facts that find no support in the transcript of the evidence.

After a painstaking study of the evidence we are so impressed with the fairness of the chancellor's findings and conclusions upon the material facts that we feel that we should be justified in confirming our opinion with an unqualified approval of his opinion and without any comment upon the evidence. We, however, are afraid to make a few references and comments upon certain parts of the evidence:

It is contended that plaintiff succeeded in establishing liability to hold in the corporate company in his office, in fact, he caused liability to form informal company, but to [illegible] to pay a [illegible] in [illegible] town in Oklahoma and that plaintiff [illegible] both that that a man's loan was out of the proposition. [illegible] in his financial condition did not justify such a loan [illegible] a bank in [illegible] cannot be reasonably disputed. [illegible] was [illegible] with the account that plaintiff [illegible] in the [illegible] company. [illegible] to obtain money. From plaintiff having failed to obtain from him an account [illegible] to satisfy defendant, criminal methods to obtain money from plaintiff followed, and it is our considered opinion that the evidence proves clearly this actions to defraud plaintiff. The fact that the letter was defendant's handwriter aggravates the offense. Plaintiff was a nervous, efficient man, with an inferiority complex. He was very wealthy, through inheritance, defendant stated that he knew that plaintiff had plenty of money in the bank, and the evidence shows that he knew that plaintiff carried a large bank balance and that he was grossly

negligent in the manner that he handled his bank accounts and financial affairs, and this knowledge appears to have given birth to defendant's fraudulent scheme. Plaintiff employed the First National Bank of Chicago to receive his bank statements and cancelled checks from the Continental Illinois National Bank and Trust Company of Chicago, where he had a large deposit account, and the latter bank sent its monthly statements of plaintiff's account and the cancelled checks to the First National Bank during 1940, 1941 and 1942, the period that covers the transactions involved in this suit. The First National Bank never delivered any of the cancelled checks or bank statements to plaintiff, and the latter did not make the deposits to his account in the Continental Illinois Bank, nor did he receive notifications of the deposits. When plaintiff drew a check he did not even fill out a stub for it nor make any memorandum of the issuance of the check; nor did he carry forward his bank balance in any check book. He did not have a book of checks numbered consecutively. Hoffman had a bank account with the Pullman Bank, but his balances in that account were always very small until he deposited in the account the "gift checks" for $3,031 and $6,115.05, in June and July, 1940. These were the only "gift checks" deposited in that bank. In October, 1940, defendant opened an account with the Merchandise Bank by depositing in that account the $12,500 "gift check." Defendant and his wife also opened a joint account with the same bank. That bank knew the financial condition of the Bergonize Company and in February, 1941, defendant opened an account in the Continental Bank and thereafter deposited "gift checks" in that account. It is a reasonable inference from the evidence that defendant first

tested out his scheme by raising the amounts of several small checks to amounts that were comparatively small when compared with the amounts of later "gift checks." Defendant, a former employee of the Continental Illinois Bank, knew that the check raising method was subject to the risk that the bank might discover the fraud and when he found that he could obtain from plaintiff checks signed in blank he discarded the check raising method and resorted to the plan of obtaining plaintiff's signature to blank checks, and the so-called typewritten check system was thereafter followed. There was nothing upon the face of the typewritten checks that would indicate to the bank the frauds that were being perpetrated by defendant. The last "gift check" that went through plaintiff's account, one for $7,250, was dated November 23, 1942. An investigation of the records of the Bergonize Company by Arthur Young & Company in December, 1942, led to the discovery of the frauds that had extended over a period of more than two and one-half years, and it is hardly necessary to say that no "gift checks" appeared thereafter. The report of Arthur Young & Company showed that the Bergonize Company lost, in the year ending June 30, 1941, $10,772.39, and lost in the year ending June 30, 1942, $8,832.51; and that there was a deficit on June 30, 1942, of $25,868.98. The Bergonize Company was incorporated in 1939, for the manufacture and sale of a wall coating known as Bergonize. The corporation started to function when plaintiff invested $6,000 in the company at the solicitation of defendant. Plaintiff subsequently gave a check to the company for $2,500 and was supposed to receive stock for the same, but the stock was never issued to him. As the chancellor found, that company was insolvent "since the time that Genius invested his money therein."

The major issue of fact pertains to the claim of

[illegible]

defendant that seventeen of the checks, aggregating $107,249.05, were given to him by plaintiff on account of a $150,000 inheritance that plaintiff intended to leave defendant in his will, "being, in fact [because of an alleged later understanding between the parties], gifts freely and knowingly made by the plaintiff to the defendant." Defendant testified that plaintiff first promised to leave defendant $150,000 in his will, but that he later told plaintiff that if he were going to leave defendant $150,000 in his will, why should he not give defendant the money sooner, so that he could use part of the money in connection with the Bergonize Company, and that plaintiff stated that he guessed that would be all right. While counsel for defendant contend that this testimony should be believed, they do not argue that the testimony tends to show that defendant was diffident in trying to secure money from plaintiff. It is a reasonable inference from the evidence that when defendant found that his scheme had been discovered he knew that he could not show any legitimate right to the large sums of money that he had obtained from plaintiff's bank account and he was forced to invent the story that the so-called "gift checks" represented partial payments on account of the $150,000 that Genius promised to give him.

The chancellor found that "the character and demeanor of the witness, Hoffman, while testifying herein impressed the court that he was not telling the truth about the transactions in controversy," and that "the court was impressed with the reasonableness of the story of the plaintiff as related on the witness stand and believes that said witness told the truth." The settled rule of law in this State is that where a chancellor tries a case he sees the witnesses and hears them testify, and his findings will not be disturbed

by appellate courts unless manifestly and palpably wrong; but in the instant case, in sustaining the chancellor we are not required to follow the foregoing rule because we find ourselves in full accord with the findings of the chancellor, and are satisfied that Hoffman's testimony as to the alleged gift is false in toto. Counsel for defendant appreciate the force and effect of the finding of the chancellor that "after the date of the supposed agreement for the inheritance made in Boston, there is not a single letter, memorandum or other written evidence which mentions the supposed agreement for the inheritance between Genius and Hoffman," and "there is no evidence that Genius ever discussed the supposed inheritance in the presence of any witness, not even Mrs. Hoffman, who certainly should have known of the large sums of money that her husband was receiving, and the source thereof, if Hoffman was receiving legitimately the large sums of money that are represented by the checks of Genius deposited in the bank account of Hoffman," and they have made a strenuous effort to find in some letter or document some words that might be construed as a reference to the alleged inheritance or gift, but a careful study of certain letters that are called to our attention by counsel satisfies us that none of them contains any reference to the inheritance or gift. What would cause plaintiff to make a gift of $150,000 to defendant when he had pondered over the amount that he would put into Bergonize, and finally settled on $6,000 as the amount, instead of $10,000, the maximum amount that he intended to put into that business in any event? As counsel for plaintiff state, the testimony of defendant as to the alleged gift "would tax the credulity of anyone."

by appellate courts unless manifestly and palpably wrong; but in the instant case, in evaluating the chancellor we are not required to follow the foregoing rule because we find ourselves in full accord with the findings of the chancellor, and are satisfied that Hoffman's testimony as to the alleged gift is false in toto. Counsel for defendant appreciate the force and effect of the finding of the chancellor that "either the date of the supposed agreement for the inheritance made in Germany, there is not a single letter, memorandum or other written evidence which mentions the supposed agreement for the inheritance between Hoffman and Hoffman," and "there is no evidence that Gertha ever discussed the supposed inheritance in the presence of any within so, not even Mrs. Hoffman, who certainly should have known of the large sums of money that her husband was receiving, and the source thereof, in Germany as receiving legitimately the large sums of money that are represented by the checks of Gertha deposited in the bank account of Hoffman," and they have made a strenuous effort to find in some letter or document some words which might be construed as a reference to the alleged inheritance or gift, but a careful study of certain letters that are called to our attention by counsel establishes as that none of them contains any reference to the inheritance or gift. What could cause plaintiff to make a gift of $100,000 to defendant when he had pondered over the amount that he would put into Bergonzo, and finally settled on $6,000 as the amount, instead of $10,000, the maximum amount that he intended to put into that business in any event? As counsel for plaintiff state, the testimony of defendant as to the alleged gift "would tax the credulity of anyone."

We have carefully examined the checks that the chancellor found were raised or altered, and we find ourselves in accord with the findings of the chancellor as to each. Our conclusion that defendant's testimony as to the alleged gift of $150,000 is false in toto, disposes of the defense interposed as to the "gift checks." If his testimony as to the "gift" is false in toto, then no reasonable person would believe his testimony that he did not raise the checks that the chancellor found that he raised, especially as each of the checks shows upon its face that it was raised. Viewing the evidence in the light of the careless manner in which plaintiff handled his bank accounts, we are impressed with the thought that if defendant, at the end of 1940, at which time he had already obtained a large amount of plaintiff's money, had dropped his fraudulent scheme, the frauds might not have been discovered. But his lust for money seems to have grown stronger as the scheme continued to succeed, and it finally led to the discovery of his frauds. It would unduly extend this already lengthy opinion to cite all of the many facts and circumstances that have led us to the conclusion that the chancellor was fully justified in his findings and judgment.

Defendant contends that the chancellor took a wrong view of the testimony of the experts. It is a sufficient answer to this contention to say that the testimony of all of the experts may be entirely disregarded and still the other proof shows clearly and conclusively the guilt of defendant of the charges made against him.

The judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

43235



| | | |
|---|---|---|
| HAROLD POPEL, et al, Appellees, v. METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Appellant. | ) | APPEAL FROM SUPERIOR COURT COOK COUNTY. |

106

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover upon an insurance policy on the life of David Popel. Verdict and judgment were for plaintiffs for $3,550.00, being the full amount of the policy plus interest and attorney's fees. Defendant has appealed.

The decedent a 62 year old Chicago barber died July 26, 1940 at 6:00 A. M. of acute coronary thrombosis. He had filed an application for insurance July 12, 1940. The application provided among other things that the Company should not be liable until the application had been received and approved, a policy issued and delivered and the first premium paid and accepted during the lifetime and continued insurability of the applicant.

It appears from interrogatories filed by plaintiff and read into the record as evidence by stipulation that the application was received at defendant's Home Office in New York City, July 19, 1940, and approved July 26, 1940; and that the policy was mailed from New York July 29th, and received at the Chicago District Office July 31st. After news of the insured's death had been given the District Office, the District Manager withheld the policy from delivery and returned it to the Home Office. Due proof of death was made to the defendant which refused to pay the benefits.

The defendant argues that since it is undisputed that the policy was not delivered before the insured's death, the defendant is free from liability thereon as a matter of law. Plaintiffs contend that actual delivery was waived by defendant through its conduct and that of its agent Gingiss. They say there was evidence of this waiver; that the question was accordingly one of fact for the jury; and that the verdict established it in their favor.

We take as true the evidence favorable to plaintiff in deciding this issue. If it and legal inferences from it tend to prove waiver, the question was for the jury unless reasonable men would reach but one conclusion thereon, that there was no waiver.

The parties had the right to make their own contract within the limits of the existing law. The application was the insured's offer. It provided that defendant should incur no liability until the prerequisites herein before noted had been fulfilled. Defendant depends mainly on the failure of delivery of the policy before the insured's death. Compliance with this provision was necessary, (Stramaglia v. Conservative Life Ins. Co., 319 Ill. App. 20), unless waived.

Since there was no evidence of the precise time of approval of the application on July 26th, we shall infer in plaintiff's favor that the approval preceded insured's death. Upon approval of the application the contract of insurance was made (Firemen's Ins. Co. v. Kuessner, 164 Ill. 275), upon the terms in the application. Those terms included the further prerequisites of payment and acceptance of the premium and issuance and delivery of the policy before the insured's death.

Alvin Popel and Mary Stein gave testimony which tended to prove that Gingiss, defendant's agent, accepted payment of the full

The defendant argues that since it is undisputed that the policy was not delivered before the insured's death, the defendant is free from liability thereon as a matter of law. Plaintiffs contend that actual delivery was waived by defendant through its conduct and that of its agent Hughes. They say there was evidence of this waiver; that the question was properly for the jury; and that the verdict established it in their favor.

We take as true the evidence favorable to plaintiffs in deciding this issue. If it and legal inferences from it tend to prove waiver, the question for the jury under the evidence was would reach but one conclusion thereon, in which case we reverse.

The policies had not yet gone into effect when the insured within the limits of the existing law. The application was the insured's offer. It provided that defendant should incur no liability until the prerequisites herein before stated were fulfilled. Defendant depends mainly on the failure of delivery of the policy before the insured's death. Consideration with invitation was necessary. (Stevenglia v. Conservative Life Ins. Co., 210 Ill. App. 20), unless waived.

Since there was no evidence of the exact time of approval of the application on July 28th, we shall infer in plaintiff's favor that the approval preceded insured's death. Upon approval of the application the contract of insurance was made (Lingenfelser v. Knesener, 164 Ill. 275), upon the terms in the application. These terms included the further prerequisites of payment and acceptance of the premium and issuance and delivery of the policy before the insured's death.

Alvin Popel and Mary Stein gave testimony which tended to prove that Hughes, defendant's agent, accepted payment of the full

premium the day preceding insured's death. This testimony is corroborated by a letter written to Gingiss by Harold Popel from California, July 22nd, enclosing the premium check,

In addition to the evidence of payment and acceptance of the premium before the insured's death there is further evidence that defendant through Gingiss knew of the insured's death on July 26; that Gingiss said he would take care of the insurance arrangements; that he endorsed the premium check "Advance premium"; that the District Manager accepted the check after knowledge by Gingiss of insured's death, gave credit thereon and forwarded the check to the Home Office; that the Home Office deposited the check July 31st, after knowledge by Gingiss of the death; that through Gingiss defendant requested and accepted proof of death, after knowledge that the insured had died; that defendant informed plaintiffs that its refusal to pay the benefits was based on the payment of premium after death; and that after knowledge of insured's death through Gingiss, defendant issued the policy.

From this evidence plaintiffs argue that knowledge of insured's death was imputed to the defendant on July 26th and that by its conduct in accepting the premium, issuing the policy, and requesting the death certificate, they treated the policy as in force and effect and waived actual delivery. They rely upon Fireman's Ins. Co. v. Kuessner, 164 Ill. 275; Illinois Central Ins. Co. v. Wolf, 37 Ill. 355; Mulligan v. Metropolitan Life Ins. Co., 149 Ill. App. 516; and Wenz v. Business Men's Acc. Assn. 212 Ill. App. 581.

In the Kuessner case the premium was not paid until after the fire loss. The court sustained the claim. It is enough to distinguish that case to point out that there was no question of delivery of the policy and the payment of the premium in advance was not a condition precedent. In the Wolf case the insurance company was not permitted to void a policy for nonpayment of a note

premium the day preceding insured's death. This testimony is corroborated by a letter written to Hughes by Arnold Fogel from California, July 22nd, enclosing the premium check.

In addition to the evidence of payment and acceptance of the premium before the insured's death there is further evidence that defendant through Hughes knew of the insured's death on July 28; that Hughes said he would take care of the insurance arrangements; that he endorsed the premium check "Adv. for premium"; that the District Manager accepted the check after knowledge of Hughes of insured's death, gave credit thereon and transmitted the check to the home office; that the Home Office deposited the check; that after knowledge by Hughes of the death; that insured's [illegible] accepted and accepted proof of death, after knowledge that the insured had died; that defendant informed plaintiffs that it refused to pay the benefits was based on the payment of premium after the insured; and that after knowledge of insured's death through Hughes, defendant issued the policy.

From this evidence plaintiff [illegible] knowledge of insured's death was imputed to the defendant on July 28th and that by its conduct in accepting the premium, issuing the policy, and requesting the death certificate, they [illegible] the policy in force and effect and waived actual delivery. [illegible] upon Kneppenberg Ins. Co. v. Kneppenberg, 106 Ill. 279; Illinois Central Ins. Co. v. Hall, 37 Ill. 268; Mullikes v. Metropolitan Life Ins. Co., 149 Ill. [illegible] 316; and Wenz v. Business Men's Acc. Assn. 171 Ill. App. 621.

In the Kneppenberg case the premium was not paid until after the fire loss. The court sustained the claim. It is enough to distinguish that case to point out that there was no question of delivery of the policy and the payment of the premium in advance was not a condition precedent. In the Hall case the insurance company was not permitted to void a policy for nonpayment of a note

taken as a premium where the policy recited that the premium had been paid. In the Mulligan case the agent agreed that the condition requiring advanced premium could be met by payment in installments. The court held that the payment in full in advance was waived and that receipt by the agent of the policy under those circumstances was receipt by the assured to fulfill the condition of delivery. The policy, however, was received by the agent several days preceding the assured's death. In the Wenz case the company wrote assured of its approval of his application and said, " * * * the policy is enclosed." The assured received the letter but the policy was not enclosed. It was later mailed to the agent to be delivered to the assured. While the agent was on his way to make delivery, a cyclone killed the assured. The court held that under those circumstances there was delivery because the intention to make delivery was so clearly expressed.

Fulfillment of less than all the conditions named in the application would not, in the absence of waiver of the fulfilled conditions, render the contract effective. The evidence, therefore, of the various steps taken by the defendant did not of themselves render the policy effective for they logically preceded delivery. We cannot say, therefore, that because these conditions alone were met that the contract was treated as in force and effect. The steps the company took were those provided in the application. It had no obligation to determine before or while taking them, that the insured had died. It had saved to itself in the application the privilege of determining this when it was prepared to deliver. To hold that, by performing the previous steps, defendant relinquished the protection it saved to itself, it would seem to us would frustrate the meaning of its agreement.

If plaintiffs prevail it must be because Gingiss, on behalf of the defendant, waived delivery. If Gingiss intended to

taken as a premium where the policy recited that the premium had been paid. In the Mullican case the agent agreed that the conditions requiring advanced premium could be met by payment [illegible]. The court held that the payment in full in advance was waived and that receipt by the agent of the policy under those circumstances was receipt by the assured to fulfill the condition of delivery. The policy, however, was received by the agent several days preceding the assured's death. In the [illegible] case the company [illegible] its approval of the application and [illegible] the policy [illegible] enclosed." The assured received the [illegible] enclosed. It was later mailed to the [illegible] assured. While the agent was on his way [illegible] killed the assured. The court held that under [illegible] there was delivery because the [illegible] clearly expressed.

Fulfillment of [illegible] the conditions [illegible] application would not, in [illegible] conditions, render the contract effective. [illegible] of the various steps [illegible] the defendant [illegible] render the policy effective for they logically preceded delivery. We cannot say, therefore, that because these conditions alone were met that the contract was treated as in force [illegible]. The steps the company took were those provided in the application. It had no obligation to determine before or while testing [illegible] the insured had died. It had saved to itself in the application the privilege of determining this when it was necessary to deliver. We hold that, by performing the previous steps, defendant relinquished the protection it saved to itself. It would seem to us would frustrate the meaning of the agreement.

If plaintiffs prevail it must be because Staples, on behalf of the defendant, waived delivery. If Staples intended to

waive delivery, knowing that the insured had died, he could hardly be considered defendant's agent in so doing. If we consider his conduct, taking plaintiffs' evidence as true, we must infer that Gingiss knew of the insured's death Friday the 26th, but did not inform the District Office of the fact until the District Manager had forwarded the premium check to the Home Office. To do otherwise would be to assume that the District Manager, knowing the insured had died, treated the insurance contract as in effect and waived the delivery condition. Such an assumption is neither justified by the experience of men and practice of insurance companies or by the conduct of the District Manager withholding the policy after he had received it July 31st.

Plaintiffs had the burden of proving waiver; and that proof must show either an expressed intention to waive or that defendant after knowledge of the insured's death treated the transaction as though the prerequisites had been fulfilled. Seaback v. Metropolitan Life Ins. Co., 274 Ill. 516 and Pollock v. Connecticut Fire Ins. Co. 362 Ill. 313.

We think that all reasonable men would reach but one conclusion on the evidence favorable to plaintiff and that is that the evidence did not tend to prove the defendant intended to waive, or that it treated , after knowledge of insured's death, the prerequisites as having been fulfilled.

The judgment of the Superior Court is, accordingly, reversed and the cause is remanded with directions to enter judgment for defendant.

JUDGMENT REVERSED

LEWE AND BURKE, JJ. CONCUR.

waive delivery, knowing that the insured had died, we could [illegible] be considered defendant's agent in so doing. If we consider his conduct, taking plaintiff's evidence as true, [illegible] Gingles knew of the insured's death [illegible] inform the District Office of the [illegible] had forwarded the premium check to [illegible] would be to assume that the district [illegible] had died, treated the insurance contract [illegible] the delivery condition. Such an assumption [illegible] the experience of men and practice of [illegible] conduct of the District Manager [illegible] received it July 21st.

Plaintiffs had the burden of [illegible] must show either an express [illegible] after knowledge of the insured's death [illegible] though the prerequisites had been fulfilled [illegible] Life Ins. Co., 274 Ill. 315 and Gillock v. [illegible] 388 Ill. 312.

We think the [illegible] conclusion on the evidence [illegible] evidence did not tend to prove the [illegible] that it treated, after knowledge of insured's death, [illegible] as having been fulfilled.

The judgment of the Superior Court is, accordingly, [illegible] and the cause is remanded with directions to enter judgment for defendant.

JUDGMENT REVERSED

LEWIS AND HUFFER, JJ., CONCUR.

43264

327 I.A. 111

ANNE NEIMAN,
Appellee,

v.

AARON NEIMAN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

107

MR. PRESIDING JUSTICE KILEY delivered the opinion of the court.

This is a separate maintenance action. The trial court entered an order granting support and maintenance, to plaintiff and her children, and attorneys' fees, upon recommendation of a Special Commissioner. Thereafter, pursuant to plaintiff's petition for a rule to show cause, an order was entered finding defendant guilty of contempt and directing an attachment to issue for his arrest. Defendant filed notice of appeal from both orders.

On March 21, 1944, plaintiff filed her suit alleging, among other things, the marriage, birth of two children, her good conduct as defendant's wife, his cruelty to her and the children, his occupation as a practicing physician, his wealth at $35,000 and his income in excess of $10,000 a year. She asked for a decree of separate maintenance, custody of the children, suitable sums for support and maintenance, and attorneys' fees and an injunction.

Defendant's answer made issue of the material allegations of the complaint. Subsequently, on plaintiff's motion for alimony and support, the matter was referred to the Special Commissioner to take evidence and report his conclusions.

June 30, 1944, the commissioner reported his findings of law and fact and recommended that $400 per month be allowed, as of March 24, 1944, to plaintiff for her support and that of the children; that to the date of the report the sum of $1200 had accrued in plaintiff's favor; that commencing June 23, 1944 defendant should pay $200 semi-monthly on account of the allowance; and that $1,000 be allowed her for her attorneys' fees. July 14th the court entered the order confirming the report and making the allowance recommended.

July 21st defendant presented a petition praying that the order of July 14th be vacated. Leave was given to file the petition and hearing thereon was set for August 22nd. On that date plaintiff filed a petition asking for a rule upon defendant to show cause why he should not be punished for contempt in failing to make the payments ordered July 14th.

On plaintiff's petition for a rule to show cause, the court on August 31st found that defendant owed $2,000 support money, $1,000 attorney's fees under the order of July 14th; that the defendant appeared but showed no cause why he could not have made the payments; that the failure to make the payments was a wilful and contumacious refusal and defendant was guilty of contempt; and ordered a writ of attachment to issue to bring defendant before the court. Defendant's petition to vacate the order of July 14th was denied.

Defendant gave notice of appeal from the order of July 14th and the order for the issuance of the attachment on August 31st. The latter order is not appealable. An attachment for contempt is merely a process to arrest the body of the person complained of to be brought before the court to show cause why he should not be punished for the contempt. Ex parte Petrie, 38 Ill. 498. Since the order does not direct punishment, it is not final. McEwen v. McEwen, 55 Ill. App. 340. We shall

June 30, 1944, the commissioner recommended a judgment of law and fact and recommended that $800 per month be allowed as of March 24, 1944, [illegible] the order [illegible] the children; that [illegible] the support [illegible] $2,000 [illegible] assumed in plaintiff's favor; [illegible] the defendant should pay $800 monthly [illegible] the [illegible] and that $1,000 be allowed and for [illegible] the court enters the order [illegible] allowance recommended.

July 21st [illegible]

the order of June 14th be vacated [illegible] petition [illegible] date preliminary [illegible] to show cause why [illegible] line to make [illegible] order [illegible]

On [illegible] the [illegible] order [illegible] court on June 21st [illegible] money, $1,000 attorney's [illegible] the defendant appeared but [illegible] made the payments; that [illegible] willful and contumacious [illegible] ability of defendant; and ordered a rule of [illegible] to show cause why [illegible] before the court. Defendant's [illegible] July 14th was denied.

Defendant gave notice of appeal from the order of July 14th and the order for the issuance of the attachment on August 31st. The latter order is not appealable. An attachment for contempt is merely a process to arrest the body of the person complained of to be brought before the court to show cause why he should not be punished for the contempt. Ex parte Patrick, 38 Ill. 488. Since the order does not direct punishment, it is not final. McEwen v. McEwen, 55 Ill. App. 340. We shall

not, therefore, review the order of August 31st.

Defendant complains that the allowance of $250 for the Special Commissioner was excessive. The order of allowance was entered on June 30, 1944. No appeal was taken from that order. The allowance was not included in the order of July 14th. The question of the Special Commissioner's fee is, therefore, not before us.

The defendant complains that Attorney Selinger was not given an opportunity on July 14th to represent defendant properly. The record disclosed that between June 30th, when the report was submitted, and July 14th, four attorneys appeared for defendant. Those who preceded Selinger were accommodated liberally with extensions of time for filing exceptions and continuances of hearings thereon. July 14th was the last day of the court year. The hearing was finally set for that day. That morning Davis, defendant's third attorney sought to withdraw and Selinger sought substitution and a continuance to study the report and exceptions. He had been employed by defendant that morning. The court denied the requests and entered the order appealed from. Defendant was entitled to an opportunity to except to the report and to be heard. Each succeeding attorney was entitled to that opportunity. Defendant was given ample opportunity. The court was imposed upon. No error was committed in its action.

Defendant says that the Commissioner exercised judicial power in "fixing" the allowances. He says the trial court did not consider or study the report before confirming it. In the colloquy July 14th the court inquired, "What is the Commissioner's report?" and stated, "Your petition is denied and the court confirms the Commissioner's report." The formal order, however, recited that the court was fully advised in the premises. There is nothing in the record to show at what precise time the order was entered. We cannot presume that the court did not read the

not, therefore, review the order of August [illegible].

Defendant complains that the [illegible] the Special Commissioner was excessive. [illegible] was entered on June 20, 1944. No appeal was [illegible] the allowance was not included in [illegible] question of the special commissioner's [illegible] before us.

The record in [illegible] given an opportunity on [illegible] The record [illegible] submitted, and [illegible] Those who presented [illegible] claims of the [illegible] thereon. [illegible] hearing was [illegible] and's [illegible] attorney [illegible] attitude [illegible] he had been employed [illegible] the requests and [illegible] entitled to an opportunity to [illegible] Each succeeding attorney [illegible] and was given ample opportunity. [illegible] No error was committed in the action.

Defendant says that the [illegible] power in "fixing" the allowance. [illegible] not consider or study the report before confirming it. [illegible] colloquy duly left the court inquired, "Did [illegible] report?" and stated, "Your petition is filed and the court confirms the Commissioner's report." The formal order, however, recited that the court was fully advised in the premises. There is nothing in the record to show at what proceeding the order was entered. We cannot presume that the court did not read the

report so as to form a fair basis for the allowances made. Furthermore, we have before us the report, exceptions and orders. The Commissioner did not fix the allowances - he recommended them.

Defendant complains of the allowances made in the order of July 14th. The Commissioner's findings of fact having been approved by the chancellor, should not be disturbed unless against the manifest weight of the evidence. Staufenbeil v. Staufenbeil, 388 Ill. 511. In arriving at the proper allowances the court should consider such factors as the ages of the parties, their condition of health, the property and income of the husband, separate property and income, if any, of the wife; and the previous condition of the parties.

It is admitted that plaintiff has no income or property of her own.

The parties were married in 1931. Their two children are 6 and 11 years old. Defendant entered the army in 1942. He served about 14 months. During his service plaintiff lived near his camps for several months. During the 13 years of their marriage they went together to Florida twice. Defendant went alone on four other occasions. Plaintiff owned at the time of the trial a Persian lamb, and a Hudson seal, coat which defendant had given her during the years before his army service. These cost more than $800.

The Commissioner found that since defendant resumed his practice on January 1, 1944, he paid $105 monthly for family rent; that he gave plaintiff $40 per week for the maintenance of the family table; that plaintiff was accustomed to a maid at $20 a week; and that defendant paid gas bills of $3.50 per month, electric bill $6.50 per month, telephone bill averaging $11 per month, clothing for plaintiff and the two children $100 per month, laundry $20 per month, cleaning bill $5.00 and storage of furniture of $19.50 per month. Defendant objects to the allowance

report so as to form a fair basis for the [illegible]. Furthermore, we have before us the record, [illegible] the Commissioner did not [illegible] -

Defendant complains [illegible] of July 14th. The [illegible] approved by the Commission, [illegible] the manifest weight of the evidence. [illegible] 382 121. 124. [illegible] should consider such factors as [illegible] condition of health, the [illegible] separate property [illegible] condition of [illegible].

It is [illegible] of her own.

The petitioner [illegible] and 21 years old. [illegible] served about [illegible] the camps for several [illegible] marriage they went to [illegible] along on four other occasions. [illegible] the total [illegible] had given her during the years [illegible] cost more than $[illegible].

The Commission found that [illegible] practice on January 1, 1944, [illegible] that he pay plaintiff $40 per week for [illegible] of the family table; that plaintiff was accustomed to a maid [illegible] a week; that defendant paid gas bills of $4.50 per month, electric bill $6.50 per month, telephone bill averaging $11 per month, clothing for plaintiff and the two children $100 per month, laundry $20 per month, cleaning bill $3.00 and storage of furniture of $10.50 per month. Defendant objects to the allowance

for a maid while the parties are living in a furnished apartment with maid service. We think this objection is sound. Excluding that $80 a month item, however, the several items amount to more than $400 per month. Defendant's testimony of the foregoing items differs somewhat. The decision involved a question of credibility and, for the reason hereinafter shown, we cannot say that the Commissioner should not have adopted the plaintiff's version.

Plaintiff's prima facie case was made by the testimony of these customary items of expenses; of admissions by defendant that his income was in excess of $10,000 per year; of $20,000 in bonds, $1,000 cash, and $20,000 in insurance which plaintiff saw in his safety deposit box; and a writing of defendant's found by plaintiff in the joint safety deposit box, dated November 10, 1942, indicating securities owned by defendant, amounting to almost $17,000. Plaintiff testified that the family expenses since defendant returned from the army were, except for the rent, about the same as they had been before he entered the army.

Defendant's attempt to meet this proof was highly unsatisfactory. The master found that defendant was requested to bring in books and records, but failed to do so; that his testimony of income was based upon his memory; that his memory was indefinite as to his bond and cash assets; that his one account book disclosing receipts consisted of sheets which, as the accounts were paid, were taken from the book and destroyed; and that having no records of his business he was unable to break down his income account to show how much money he received, and from whom he received it. The Commissioner further found that there was only one inference that the defendant did not keep a true and accurate account. He further found that the only manner in which he could ascertain the doctor's income was through the testimony herein referred to on behalf of the plaintiff. These findings of the Commissioner

for a maid while the machine was having to [illegible] unpaid treatment with paid service. He think this object [illegible] that $80 a month item, however, the [illegible] than $400 per month. [illegible] items differs considerably. [illegible] credibility and, for the [illegible] that the defendant's [illegible] version.

Plaintiff's [illegible] of these customary items of [illegible] that his income was in excess of [illegible] in bonds, $1,000 cash, [illegible] are in his safety deposit box; [illegible] by plaintiff in the joint safety deposit box, [illegible] 1942, indicating accounts in [illegible] almost $27,000. [illegible] since defendant returned [illegible] about the same as they had been [illegible]

Defendant's [illegible] factory. The factory [illegible] in books and records, but failed to [illegible] income was based upon his security [illegible] to the bond and cash assets; [illegible] receipts consisted of checks which, [illegible] taken from the book and destroyed; and [illegible] his business he was unable to break down his income account to show how much money he received, another when he received it. The Commissioner further found that there was only one [illegible] that the defendant did not keep a true and accurate account. He further found that the only manner in which he could ascertain the doctor's income was through the testimony herein referred to on behalf of the plaintiff. These findings of the Commissioner

are supported by the record.

During the course of the hearings and without notice, the defendant went to Florida where he spent in eight days, according to his own version, about $350 and, according to the finding of the Commissioner about $600. According to the defendant's testimony, including his deposits shown by the bank statement and his memory of cash receipts, his total receipts for January 1944 were $680, for February $761 and for March $677. Moreover, there is evidence that at the time of the hearing defendant had about $4,160 in cash.

Under all the circumstances we believe the Commissioner followed the only course available to him. If defendant has been injured, it is due to his own lack of records and proof. With a proper system of accounting of his practice, it should be a simple matter for him to make a full and frank disclosure at any future time, should he seek a reduction in the allowance by a proper proceeding. A full disclosure made at the hearing upon the permanent allowance on a basis of true and accurate accounts, properly kept, should furnish reasonable protection to the defendant. Buehler v. Buehler, 373 Ill. 626, 631. We believe that the Commissioner's recommendations as affirmed by the trial court are proper. Byerly v. Byerly, 363 Ill. 517; and Buehler v. Buehler.

The order of July 14th allowedpplaintiff $1,000 attorneys' fees. Defendant contends that this allowance was excessive. There was testimony that plaintiff's counsel spent 150 hours in conferences, preparation of pleadings, motions, etc., court appearances, examination of witnesses, documents and hearings before the Special Commissioner. There were nine hearings before the Commissioner. Plaintiff's counsel testified that he spent 14 hours in these hearings. We are of the opinion that the sum of $650 would be a fair fee for plaintiff's counsel.

are supported by the record.

During the course of the proceeding [illegible] defendant went to Florida where he [illegible] to his own version, some $300.00, according [illegible] the Commissioner's report [illegible] monthly, including his [illegible] secretary of [illegible] $800, for [illegible] evidence that it [illegible] $4,200.00 in [illegible].

[illegible] full and [illegible] injured, it is [illegible] proximate cause of [illegible] matter for this [illegible] time, should be [illegible] section. A full [illegible] allowance in a [illegible] short [illegible] Publishing, 273 Ill. App. [illegible] recovered [illegible] v. Byerly, 270 Ill. App. [illegible].

The [illegible] fees. Defend [illegible] was testimony that plaintiff's [illegible] errors, preparation of pleadings, [illegible], etc., [illegible] examination of witnesses, [illegible] hearings before the [illegible] Commissioner. There were nine hearings before the [illegible]. Plaintiff's counsel testified that he spent 14 hours in the [illegible] tage. We are of the opinion that the amount of $800 was [illegible] fee for plaintiff's counsel.

The order of July 14th is modified by reducing the attorney's fees to $650 and, as modified, the order is affirmed.

ORDER AFFIRMED AS MODIFIED.

LEWE AND BURKE, JJ. CONCUR.

-4-

The order of July 14th is modified by reducing the attorney's fees to $250.00 and, as modified, the order is affirmed.

ORDER AFFIRMED AS MODIFIED.

LEWIS AND BURKE, JJ., CONCUR.

43267

327 I.A. 311

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| FRANK H. WEBER, Appellant, v. MADELEINE A. WEBER, Appellee. | ) | APPEAL FROM CIRCUIT COURT COOK COUNTY. |

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Frank H. Weber married Madeleine A. Weber on September 1, 1927. He was 22 years old and she was 27 years old. They lived in Chicago. They separated on July 2, 1942. No children were born of the marriage. She had a daughter by a previous marriage. In 1939 the parties purchased a residence at 11426 Longwood Drive, Chicago, the title being taken by them as joint tenants. There was a mortgage on the property on which he was making payments of $83.79 a month. On July 8, 1942 he filed a verified complaint in the Circuit Court of Cook County, naming his wife as defendant. Therein he asserted that he was able and desirous of making reasonable and suitable provision for the separate maintenance of his wife under the order and direction of the court. He prayed that a decree be entered providing for the proper and suitable maintenance and support of his wife and that she and her agents be restrained from molesting, interfering or intermeddling with him in the conduct of his business or otherwise. Subsequently, he filed an amended complaint wherein he asked only for injunctive relief. On July 30, 1942 Mrs. Weber filed a counterclaim for separate maintenance. He answered. For convenience we will hereinafter call the counterclaim the complaint, the counterplaintiff, Mrs. Madeleine A. Weber, the plaintiff, and the counterdefendant, Mr. Frank H. Weber, the defendant.

43287

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|---|---|
| FRANK H. WEBER, | [illegible] |
| Appellant, | |
| v. | [illegible] |
| MADELINE A. WEBER, | [illegible] |
| Appellee. | |

MR. JUSTICE HUNTER [illegible]

Frank H. Weber married Madeline [illegible] in 1927. He was [illegible] years old [illegible] lived in Chicago. They separated [illegible] 1941. [illegible] were born of the marriage. [illegible] marriage. In 1939 the parties purchased [illegible] Longwood Drive, Chicago, [illegible] tenants. There was a mortgage on the premises [illegible] making payments of $82.70 a month. On July [illegible] verified complaint in the Circuit Court of [illegible] his wife as defendant. [illegible] desirous of making reasonable and suitable provision for the separate maintenance of his wife under [illegible] the court. He prayed that a decree be entered [illegible] proper and suitable maintenance and support of his wife and that she and her agents be restrained from molesting, interfering or intermeddling with him in the conduct of his [illegible]. Subsequently, he filed an amended complaint wherein he asked only for injunctive relief. On July 20, 1942 [illegible] filed a counterclaim for separate maintenance. He answered. For convenience we will hereinafter call the counterclaim the complaint, the counterplaintiff, Mrs. Madeline A. Weber, the plaintiff, and the counterdefendant, Mr. Frank H. Weber, the defendant.

On August 4, 1942 the court required him to pay $225.00 a month for her temporary maintenance and support, exclusive of necessary medical expenses, and that he continue to pay the mortgage indebtedness and "all obligations thereunder on the home or premises known as 11426 Longwood Drive, Chicago, Illinois, as each and all become due and payable, in which home said Madeliene A. Weber shall and she is hereby given the right and authority to continue to live and reside." When the case came on for trial on March 24, 1944 the attorney for defendant announced that he was abandoning his complaint for an injunction, being satisfied that Mrs. Weber would not attempt to interfere in her husband's affairs. Following a trial before the chancellor, a decree was entered May 29, 1944, finding that plaintiff had sustained the allegations of her complaint; that she had been living separate and apart from him through no fault on her part since the month of July, 1942; that she has no independent means of support; that his income is "slightly over $20,000.00 yearly, gross, that disputed evidence shows a net of over $8,500.00 yearly," and that he is well able to pay her $300.00 a month for her support, plus payments on the mortgage, on his life insurance policies, expenses incurred in the suit, her attorney's fees and costs. The decree directed him to pay her $300.00 a month until the further order of the court; that she be allowed to occupy the premises at 11426 Longwood Drive; that he be required to pay all installments on the mortgage as they came due, water and tax bills; that he keep in force and unimpaired all life insurance policies on his life wherein she was the beneficiary; that he pay $75.00 which she was obligated to pay to an accountant who had gone over his books; that he (defendant) pay $31.50 for a court reporter's fee, $250.00 for

On August 4, 1942 the court required him to pay $250.00 a month for her temporary maintenance and support, exclusive of necessary medical expenses, and that he continue to pay the mortgage indebtedness and "all obligations thereunder on the home or premises known as 11436 Longwood Drive, Chicago, Illinois, as each and all become due and payable, in which home said defendant A. Weber shall and are is hereby given the right and authority to continue to live and reside." Weber has been one for the total on March 24, 1944 the attorney for defendant announced that he was abandoning his complaint for an injunction, "the indication that Mrs. Weber would not attempt to interfere in her husband's affairs. Following a trial before the chancellor, a decree was entered May 20, 1944, finding that plaintiff had established the allegations of her complaint; that she had been living separate and apart from him through no fault of her own since the month of July, 1942; that she has no independent means of support; that his income is "slightly over $10,000.00 yearly, gross", that the record evidence shows a net of over $6,000.00 yearly, and that he is able to pay her $250.00 a month for her sole use, plus payments on the mortgage, on his life insurance policies, expenses incurred in the suit, her attorney's fees and costs. The decree directed him to pay her $300.00 a month until the further order of the court; that she be allowed to occupy the premises at 11436 Longwood Drive; that he be required to pay all installments on the mortgage as they come due, water and tax bills; that he keep in force and unimpaired all life insurance policies on his life wherein she was the beneficiary; that he pay $75.00 which she was obligated to pay to an accountant who had gone over his books; that he (defendant) pay $31.50 for a court reporter's fee, $250.00 for

attorney's fees for services rendered by Mr. David Schallman and $700.00 for attorney's fees for services rendered by Mr. Norman Becker. Defendant appeals from the decree. No cross errors have been assigned.

Mrs. Weber presented her case on March 24, 1944 by the testimony of several witnesses including herself. After her attorney had concluded his examination of each witness, he tendered the witness for cross-examination, whereupon the attorney for Mr. Weber announced "no cross-examination". Her attorney then stated that he had presented his case in chief, except that part whereon he would base his argument for support, maintenance, attorney's fees and suit money. Thereupon, the attorney for defendant moved that the complaint be dismissed for want of equity on the ground that he had filed an answer setting up specific affirmative defenses, to which no reply was filed, and that hence such affirmative defenses were confessed. The court denied the motion and inquired as to whether defendant intended to introduce evidence. His attorney answered, "No." The court then stated: "There should be no need of putting in evidence. The court has some idea whether or not there should be a decree here." The court further stated that he would like to look into the matter in view of the fact that defendant was standing on his answer and maintaining that the facts therein set out were admitted. The court continued the case until March 31, 1944. At that time the attorney for plaintiff presented a reply denying the allegations of the answer. Leave was granted to file the reply. Defendant concedes that it was filed, although it does not appear in the record.

When the trial was resumed on March 31, 1944 the chancellor announced that he adhered to his ruling which denied defendant's motion to dismiss the complaint. The attorney for

attorney's fees for services rendered by Mr. David Schulman and $700.00 for attorney's fees for services rendered by Mr. Norman Becker. Defendant appeals from the decree. No cross errors have been assigned.

Mrs. Weber presented her case on March 6, 1944 by the testimony of several witnesses including herself. After her attorney had concluded his examination of each witness, he tendered the witness for cross-examination, whereupon the attorney for Mr. Weber announced "no cross-examination". Her attorney then stated that he had presented his case in chief, except that upon verdict he would base his argument for suit out, maintenance, attorney's fees and suit money. Thereupon, the attorney for defendant moved that the complaint be dismissed for want of equity on the ground that he had filed an answer setting up recrimination affirmative defenses, to which no reply was filed, and that hence such affirmative defenses were confessed. The court sustained the motion and inquired as to whether defendant intended to introduce evidence. The attorney answered, "No." The court then stated: "There should be no need of putting in evidence. The court does not care whether or not there should be a decree here." The court further stated that he would like to look into the matter in view of the fact that defendant was standing on his answer and maintaining that the facts therein set out were admitted. The court continued the case until March 21, 1944. At that time the attorney for plaintiff presented a reply denying the allegations of the answer. Leave was granted to file the reply. Defendant concedes that it was filed, although it does not appear in the record.

When the trial was resumed on March 22, 1944 the chancellor announced that he adhered to his ruling which denied defendant's motion to dismiss the complaint. The attorney for

plaintiff announced that he would give opposing counsel the opportunity of recalling witnesses "to cross-examine them or ask them any questions that are pertinent to theissue," and that he would also consent to counsel putting in any defense that he desired. Counsel for defendant indicated that he would stand on his motion. The attorney for plaintiff then placed her on the stand and asked her questions relating to the financial status of her husband and herself. The hearing was postponed to April 10, 1944, when a new attorney appeared for defendant. This attorney asked that he be permitted to introduce evidence on the merits. The chancellor inquired as to what evidence he expected to introduce, and he stated he would like to cross-examine the "important witnesses who testified on direct examination." The chancellor replied that the cross-examination "has ceased". The attorney for plaintiff stated that he had no objection. The court indicated that he would not allow the defendant to cross-examine the witnesses who had theretofore testified. Thereupon defendant called plaintiff to the stand and examined her under Section 60 of the Civil Practice Act. He then put on witnesses in behalf of defendant, who were fully interrogated by the respective parties. He did not make any offer as to what he would prove or attempt to prove by the cross-examination of any witness who had theretofore testified. He did not endeavor to recall any witness (except plaintiff) who had theretofore testified.

In arguing that the decree should be reversed without remanding, defendant states that where the answer "sets forth affirmative material defenses, and the counter-plaintiff goes to trial without filing a reply denying those material allegations or facts set forth in the answer, which are a complete defense to her suit, she has admitted all such facts well pleaded." Defendant waived the cross-examination of witnesses and when plaintiff rested,

plaintiff announced that he would give opposing counsel the opportunity of recalling witnesses "to cross-examine them or ask them any questions that are pertinent to the issues," and that he would also consent to counsel putting in any defense that he desired. Counsel for defendant indicated that he would stand on his motion. The attorney for plaintiff then placed her on the stand and asked her questions relating to the financial status of her husband and herself. The hearing was postponed to April 10, 1944, when a new attorney appeared for defendant. This attorney [illegible] that he be permitted to introduce evidence on the merits. The court replied [illegible] to what evidence he expected to introduce, and [illegible] he would like to cross-examine the "important witnesses" who [illegible] on direct examination." The counsellor replied that the cross-examination "has ceased". The attorney for plaintiff [illegible] that he had no objection. The court indicated that [illegible] allow the defendant to cross-examine the witnesses who had theretofore testified. Thereupon defendant called plaintiff to the [illegible] examined her under Section 60 of the Civil Practice Act. [illegible] witnesses in behalf of defendant, who were fully interrogated by the respective parties. He did not make any offer as to what he would prove or attempt to prove by the cross-examination of any witness who had theretofore testified. He did not endeavor to recall any witness (except plaintiff) who had theretofore testified.

In arguing that the decree should be reversed without remanding, defendant states that where the answer "sets forth affirmative material defenses, and the counter-plaintiff goes to trial without filing a reply covering those material allegations or facts set forth in the answer, which are a complete defense to her suit, she has admitted all such facts well pleaded." Defendant waived the cross-examination of witnesses and when plaintiff rested,

moved that the complaint be dismissed for want of equity. He based this motion on the assumption that his answer presented an affirmative defense, and that since no reply negativing such defense was filed by plaintiff, that she admitted the defense. We are unable to understand why defendant did not make his motion at the commencement of the trial, for if the alleged affirmative defense was admitted as a matter of law, it was admitted at the time the trial commenced and it should not have been necessary to introduce any testimony. If defendant's position be correct, it would have been a waste of the court's time to introduce any testimony on behalf of plaintiff. We have examined the complaint and the answer. The complaint sets up ultimate facts which, if proved, would entitle plaintiff to a decree for separate maintenance. The answer does not set up any affirmative defense. It merely alleges ultimate facts in opposition to plaintiff's contention that she was living separate and apart without any fault on her part. Our view is that it was not necessary for plaintiff to file a reply to the answer and that her failure to do so under the factual situation did not constitute an admission by her that the allegations by him in the answer were true. We are also of the opinion that the chancellor had the right to grant leave to plaintiff to file a reply denying the facts alleged in the answer. The case was before the chancellor and he had a broad discretion to control the conduct of the trial. This discretion would allow him to grant a litigant an opportunity to file a reply where the litigant, through inadvertence, had failed to file a reply. The case was continued from time to time and the fact that the chancellor allowed plaintiff to file a reply was not prejudicial to the rights of defendant. Section 46 of the Civil Practice Act makes liberal provisions for amendments. The reply of plaintiff was analogous to an amendment, as it was for the purpose of enabling her to sustain the claim for which the motion was intended to be brought. In

moved that the complaint be dismissed [illegible] ity.
based this motion on the proposition that [illegible] on
affirmative defense, and [illegible] such
defense was filed by [illegible] defendants.
We are unable to understand why [illegible] at
at the commencement of the trial, [illegible]
defense was omitted [illegible] time the trial commenced [illegible]
to introduce any testimony. [illegible]
it would have been [illegible] testimony on behalf of [illegible]
and the answer. The [illegible] proved, would entitle [illegible]
The answer does not [illegible] allege affirmative [illegible]
that are now living [illegible] part. Our view is [illegible]
a reply to the [illegible] factual situation [illegible] allegations by him in the [illegible] opinion that the [illegible] tiff to file a reply [illegible]
case was before the [illegible] control the conduct of the trial. [illegible]
to grant a litigant an [illegible] through inadvertence, had failed to file a reply. [illegible]
continued from time to time and [illegible] that the [illegible] plaintiff to file a reply was not [illegible] to the rights of defendant. Section 46 of the Civil Practice Act makes liberal provisions for amendments. The reply of plaintiff was analogous to an amendment, as it was for the purpose of enabling her to sustain the claim for which the motion was intended to [illegible] right. In

his brief defendant argues as though the case were submitted on complaint and answer. When a case is heard on complaint and answer it is unnecessary to present any evidence. In such case the answer is taken as true. Derby v. Gage, 38 Ill. 27, 29; Piot v. Davis, 241 Ill. 434, 439; Headen v. Cohn, 292 Ill. 210,215. The fact that evidence was presented shows that the case was not heard on complaint and answer. Defendant's contention that the failure of the court to dismiss the complaint for want of equity at the close of plaintiff's case is without merit.

Secondly, defendant urges that the decree be reversed and the cause remanded for a new trial because he did not receive a fair trial. He states that the court denied him permission to cross-examine plaintiff's witnesses. We cannot agree that in so doing the court was unfair to defendant. Defendant stood on his motion to dismiss, stating that he did not intend to put on any witnesses. He had full opportunity to cross-examine each witness after the testimony of such witnesses, but declined to do so. At that time neither the chancellor nor the attorney for plaintiff knew that he intended to move to dismiss on the ground that the so-called affirmative defenses in his answer were admitted. Such motion was not made until plaintiff announced that she had rested her case in chief. After defendant procured new counsel, he decided to submit a defense and also expressed the wish to cross-examine plaintiff's witnesses who had theretofore testified. He was given full opportunity to examine plaintiff under Section 60 of the Civil Practice Act. He complains that although he was allowed to examine her under this section, he was not allowed to cross-examine her. Section 60 states that any party may be examined "as if under cross-examination" at the instance of the adverse party. Under this section defendant had full opportunity to cross-examine plaintiff. He also had the opportunity to call and introduce as

his brief defendant argues as though he were [illegible] on complaint and answer. When a case is [illegible] and answer it is unnecessary to resort any [illegible]. In such [illegible] the answer is taken as true. [illegible] v. [illegible], [illegible] Pilot v. [illegible], [illegible] [illegible] v. [illegible], [illegible]. The fact that evidence [illegible] such [illegible] was not heard on complaint and answer, [illegible] the failure of the court to [illegible] the [illegible] equity at the close of plaintiff's case [illegible].

Secondly, defendant [illegible] the [illegible] and the cause remanded [illegible] a fair trial. He at [illegible] cross-examine plaintiff's witness [illegible] doing the court was [illegible] motion to dismiss, [illegible] witnesses. He had full [illegible] after the testimony of [illegible] that time neither the [illegible] knew that he intended [illegible] so-called affirmative defense [illegible] motion was not made until [illegible] her case in chief. After [illegible] decided to submit a defense and also expressed [illegible] cross-examine plaintiff's witnesses who had [illegible] testifying. He was given full opportunity to examine [illegible] of the Civil Practice Act. He complains that although he [illegible] allowed to examine her under this section, he was not allowed to cross-examine her. Section 60 states that any party may be [illegible] "as if under cross-examination" at the instance of the [illegible]. Under this section defendant had full opportunity to cross-examine plaintiff. He also had the opportunity to call and [illegible] her to sustain [illegible]. In

his own witnesses the other witnesses who had theretofore testified. He did not do this. He did not make any offer as to what he would prove by cross-examining such witnesses.

Defendant asserts that the chancellor showed an unfair attitude when he stated "there should be no need of putting in evidence. The court has some idea whether or not there should be a decree here." The attorney who represented defendant at the time the remarks were made did not indicate that he considered the quoted remarks prejudicial to the defendant. We have read the transcript of the record and are satisfied that in making these remarks, the chancellor was discussing the contention of defendant that his defense was admitted, and his further statement that he would not introduce any evidence. The chancellor's statement that he had some idea as to whether or not a decree should be entered, was a proper statement. He heard the testimony presented on behalf of plaintiff, and as the matter stood the case was submitted to him at that time, except for evidence with respect to the financial status of the parties. In our opinion there was no unfairness in the trial. Defendant was given every opportunity to present whatever evidence or exhibits he deemed would be helpful in deciding the issues.

Defendant urges that plaintiff failed to prove by any credible evidence that she is living separate and apart from him without her fault. The evidence on this issue is conflicting. There was ample evidence to sustain the finding of the decree that she was living separate and apart from him without any fault on her part. It is interesting to note that in his original verified complaint, which was later withdrawn, that he asserted he was able and desirous of making reasonable and suitable provision for the support and maintenance of his wife. Section 35 of the Civil

his own witnesses the other witnesses who had testified. He did not do this. He did not make any offer as to what he would prove by cross-examining such witnesses.

Defendant asserts that the [illegible] attitude when he stated "there should be no [illegible] in evidence. The court has some idea [illegible] a decree here." The attorney [illegible] time the remarks were made. It was [illegible] the quoted remarks [illegible] transcript of the [illegible] remarks, the chancellor was [illegible] that his decree was [illegible] would not introduce any [illegible] he had some idea as to whether [illegible] was a proper statement. [illegible] of plaintiff, and at the [illegible] him at that time, account for [illegible] status of the parties. In any [illegible] the trial. Defendant [illegible] whatever evidence or [illegible] the issues.

Defendant urges that plaintiff failed to prove by any credible evidence that she is living apart from and separate from his without her fault. The evidence on this issue is conflicting. There was ample evidence to sustain the finding of the decree that she was living separate and apart from him without any fault on her part. It is interesting to note that in his original verified complaint, which was later withdrawn, that he asserted he was able and desirous of making reasonable and suitable provision for the support and maintenance of his wife. Section 30 of the Civil

Practice Act provides that verified allegations shall not constitute evidence except by way of admission. The chancellor saw and heard the witnesses and under the well established rule, we are not justified in overturning his findings unless they are manifestly against the weight of the evidence. Hustad v. Cerny, 321 Ill. 354.

Defendant argues that the adjudication of property rights may not be had in a separate maintenance action, citing Petta v. Petta, 321 Ill. App. 512; McAdams v. McAdams, 267 Ill. App. 124. Without going into a discussion of the power of the court in a separate maintenance action to adjudicate property rights, we point out that in this case the decree does not attempt to adjudicate the property rights of the parties. Hence, the rule announced in the cited cases is not applicable. In Glennon v. Glennon, 299 Ill. App. 13, we discussed this subject.

Defendant complains of the allowance of attorney's fees. David Schallman, plaintiff's first attorney, testified that he had received $150.00 in accordance with an order of the court and $250.00 additional was granted by the decree. Plaintiff was allowed $700.00 for the services of attorney Becker, making a total of $1,100.00 in attorney's fees. There is a voluminous record. The case required the attorneys to devote a great deal of time to it, both in the preliminary stages and in the actual trial. Mr. Becker spent 25 hours in the actual trial of the case and Mr. Schallman spent 22 hours in court. Mr. Becker also expended a great deal of time in the preparation of the case. In our opinion, the allowance to plaintiff for attorneys' services cannot be considered unreasonable. Defendant also complains of $75.00 allowed to plaintiff for the services of Mr. Koch, an auditor. Plaintiff testified that she hired Mr. Koch to check the books, but did not know what his charge would be. While Mrs. Weber was on the stand she said she wanted

Practice Act provides that a verified [illegible] alone shall not constitute evidence except by way of rebuttal. [illegible] the witnesses and under the well recognized [illegible] in overturning his finding unless they are [illegible] weight of the evidence. Hunter v. [illegible]

Defendant argues that [illegible] may not be had in a corporate [illegible] Petts, 221 Ill. App. 326; [illegible] without going into [illegible] separate entities [illegible] but that in this case the [illegible] property right of the [illegible] ited cases is not applicable. [illegible] App. 12, we [illegible] subject.

[illegible]

David Cohellman, plaintiff [illegible] received $250.00 in [illegible] $500.00 additional [illegible] $700.00 for the services. [illegible] $1,100.00 in attorney's fees. [illegible] case required the [illegible] both in the preliminary [illegible] spent 25 hours in the actual trial [illegible] spent 22 hours in court. Mr. Cooper also [illegible] time in the preparation of the case. In our opinion, the [illegible] to plaintiff for attorney's services cannot be considered [illegible]

Defendant also complains of $2.00 allowed to plaintiff for the services of Mr. Koch, an auditor. Plaintiff testified that she hired Mr. Koch to check the books, but did not know what his charge would be. While Mrs. Moser was on the stand she said she wanted

to be recompensed for the amount she would be required to pay the accountant. The attorney for defendant asked the attorney for plaintiff to tell him how much the charge was and he was informed that it was $75.00. In our opinion, the allowance of $75.00 for the auditor's fee was reasonable.

Finally, defendant maintains that the amount awarded plaintiff for her support and maintenance is so excessive as to be unconscionable and is not supported by any credible evidence in the record. In addition to the monies ordered to be paid as attorney's fees, auditor's fees, court reporter's charges and costs, the decree directs defendant to pay plaintiff for her support and maintenance $300.00 per month, that he continue to pay the installments on the mortgage, taxes and water bills, and that he maintain the life insurance policies. The payments on the mortgage are $83.79 a month and the insurance premiums are $20.00 per month. Defendant is, therefore, ordered to pay $403.79 a month, in addition to the water and tax bills. These payments total about $5,000.00 a year. The decree found that "disputed evidence shows a net of over $8,500.00 yearly". The record appears to show that the figure found as defendant's net income is before payment of income tax, and that the normal income tax on that amount would be $1,900.00, which would leave $6,600.00 out of which defendant was to pay approximately $5,000.00. There would be left to defendant the sum of $1,600.00. Plaintiff points out that while the case was pending the defendant paid her $225.00 monthly. There is evidence that the payments made by Mr. Weber depleted his capital to $350.00. The accountant hired by plaintiff to examine the books of defendant corroborated the testimony of defendant's accountant as to defendant's earnings. Defendant's earnings were much reduced by clandestine "kick-backs" to persons sending business to him, and also by payments to a "silent partner". No cross errors were assigned against the finding in the decree as to the net income

to be recompensed for the amount she would be required to pay the accountant. The attorney for defendant asked the attorney for plaintiff to tell him how much she thought would be the reasonable that it was $75.00. In our opinion, the allowance of $75.00 for the auditor's fee was reasonable.

Finally, defendant maintains that the amount awarded plaintiff for her support and maintenance is so excessive as to be unconscionable and is not supported by the evidence in the record. In addition to the monthly [illegible] attorney's fees, auditor's fee, court [illegible] costs, the decree directs defendant to pay [illegible] and maintenance $300.00 per month, the [illegible] installments on the mortgage, taxes on the [illegible], and that maintain the life insurance policies. [illegible] are $83.70 a month and the insurance premiums are [illegible] defendant is, therefore, ordered to pay [illegible] a month, in addition to the water and tax bills. [illegible] $5,000.00 a year. The decree found [illegible] and arrive [illegible] a net of over $8,500.00 yearly". The [illegible] the figure found as defendant's net income [illegible] income tax, and that the normal income [illegible] $1,000.00, which would leave $8,500.00 [illegible] day approximately $3,000.00. There would be left [illegible] sum of $1,500.00. Plaintiff points out that while the [illegible] pending the defendant paid her $[illegible] monthly. There is evidence that the payments made by Mr. Moor depleted the capital to [illegible]. The accountant hired by plaintiff to examine the books of defendant corroborated the testimony of defendant's accountant as to defendant's earnings. Defendant's earnings were much reduced by clandestine "kick-backs" to persons sending business to him, and also by payments to a "silent partner". No cross errors were assigned against the finding in the decree as to the net income

of defendant. It is obvious that if the net income as found in the decree stands, and the expenses and deductions therefrom stand, that the allowances made to plaintiff cannot be sustained. When the parties lived together defendant's income was sufficient to maintain the family in comfortable circumstances. In our opinion, the decree should be affirmed except as to that part which directs defendant to pay plaintiff $300.00 a month for support and maintenance, to pay the taxes and water bills, to maintain his insurance policies and to make the installment payments on the mortgage. Although plaintiff did not assign error as to the finding that the net income of her husband is "over $8,500 yearly", in view of the necessity of further hearings to determine the alimony to be allowed, we are of the opinion that the finding as to gross and net earnings of defendant should be and it is reversed. Plaintiff endeavors to sustain the allowance made in the decree by showing that defendant has been able to make the payments heretofore allowed. He answers that he has done so by depleting his capital, and both accountants appear to agree with him.

For the reasons stated, those parts of the decree which find that plaintiff, Madeleine A. Weber, is living separate and apart from defendant, Frank H. Weber, without any fault on her part, and finding the equities in her favor and requiring defendant to pay her attorneys' fees, auditor's fees, court reporter's charge and costs are affirmed, and the remainder of the decree is reversed and the cause remanded with directions to proceed in a manner not inconsistent with this opinion. The costs in this court are assessed against the defendant, Frank H. Weber.

DECREE AFFIRMED IN PART, REVERSED IN PART
AND CAUSE REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

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327 I.A. 412

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| JOSEPHINE UBLASI, Appellee, v. THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY, a corporation, Appellant. | APPEAL FROM CIRCUIT COURT COOK COUNTY. |

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On February 16, 1942, The Western & Southern Life Insurance Company issued two policies, each in the face amount of $500, on the life of Nick Ublasi. The policies also provided that in the event the insured died as a result of bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means, and not as a result directly, indirectly, wholly or partially from his participation in an assault or felony, the insurer would pay an accidental death benefit equal to the face amount. On January 26, 1944, while the policies were in effect, the insured was shot and killed. The insurer paid the face amount of the policies to the beneficiary, Josephine Ublasi, widow of the insured. Thereafter, she filed a complaint in the Circuit Court of Cook County against the company, alleging that her husband's death was caused by accidental means, and praying judgment for $1,000. Defendant, answering, denied that insured's death was the result of bodily injuries caused directly, exclusively and independently of all other causes by external, violent and accidental means, averred that his death resulted directly or indirectly, wholly or partially from his participation in an assault or felony, and that he was the aggressor in an affray which resulted in his death. Defendant demanded a trial by jury.

[illegible]

JOSEPHINE UDLAGI,

Appellee,

v.

THE WESTERN & [illegible] OF THE
IN, LEMUNE COMPANY, a corporation,

Appellant.

Mr. JUSTICE [illegible] DELIVERED

On February 18, 1[illegible], [illegible]

in wrongful death by the [illegible]
on the life of Alex Udlagi. [illegible]
the event the insured [illegible]
directly, [illegible]
external, violent and [illegible]
result directly, [illegible]
peril in an attempt to [illegible]
death benefit equal to [illegible]
the policies were in effect, the insurer [illegible]
insurer paid the [illegible]
Josephine Udlagi, widow of the insured. [illegible]
complaint in the Circuit Court [illegible]
alleging that her husband's death [illegible]
and praying judgment for [illegible]. [illegible]
insured's death was the result of bodily injuries [illegible]
exclusively and independently of all other causes [illegible]
violent and accidental means, averred that he [illegible] the resulting disease
or indirectly, wholly or partially from [illegible] in an
assault or felony, and that he was the aggressor in an affray which
resulted in his death. Defendant demanded a trial by jury.

Plaintiff moved for a summary judgment, supported by the following affidavit by George Tindle:

"I live at 4725 Malden Street, Chicago. On January 26, 1944 I was at a tavern called the Log Cabin, located at 1047 Wilson Avenue, Chicago. I knew Nicholas Ublasi for about three years prior to this date. I was a personal friend of his. I was in this tavern on January 26, 1944 about 3:45 A. M., at which time I noticed and heard a group of people arguing amongst themselves in a booth located in the back part of the tavern. At that time Nicholas Ublasi was standing behind the bar working as a bartender. Amongst these people was one man whom I later learned to be William Perdew. At about 4:00 A. M. Nicholas Ublasi stated out loud 'it's four o'clock and we have to close.' Other patrons who were in the tavern walked out. This group of people consisting of William Perdew, two other men and two women who were in a booth in the back of the tavern stayed. One of this group shouted 'lock the place up. We are staying.' Mr. Ublasi stated 'we have to close on the hour, the police will be around, so you must leave.' The door to the tavern had been locked on the inside. I was still on the inside, as I was waiting to drive Mr. Ublasi home. This group of people stood up and walked to the door and Mr. Ublasi opened the lock and opened the door to leave them out. They walked out. They stood on the outside of the tavern on the sidewalk, about eight feet from the door. The man whom I later learned to be William Perdew took out a revolver from his pocket and walked back to the tavern door and started kicking on the door. I said to Ublasi 'this fellow has got a gun.' Mr. Ublasi stated 'we are closed up.' Mr. Ublasi then turned his head to me and said 'Call the police.' I walked over to the telephone and lifted the receiver and called the local police at Lake View 0011. At that time Ublasi was still standing at the door on the inside of the store. Ublasi turned to me and said 'they look like stick-ups.' He walked quickly behind the bar and reached into the drawer and took out a revolver. He opened the door and walked to the sidewalk toward the east. I walked out after him. Ublasi shouted 'halt.' I continued walking and came up to Ublasi. At that moment he had reached these three men. He said, facing these three men, 'put up your hands, I am holding you for the police.' Two of them put up their hands, but William Perdew put up one hand, and with his right hand pulled out a gun and started shooting. Ublasi fell to the ground. Neither of these three men made any remarks whatsoever. William Perdew fired two shots and Ublasi fell to the sidewalk and while he was lying on the sidewalk, Perdew fired three more shots, pointing his gun toward the sidewalk, into Ublasi. The police squad car then came up immediately while the three men were still standing there and while I was still standing there. There were three policemen who jumped out of their automobile and at the point of guns instructed all of us to raise our hands and for Perdew to drop his revolver. This he did. One police officer then told me to go and call an ambulance."

The court entered an order giving defendant leave to file a motion to strike plaintiff's motion for summary judgment and also giving

Plain tiff moved for summary judgment, [illegible]

the following affidavit by [illegible] in her:

"I live at [illegible]
1944 I was [illegible]
Wilson Avenue, Chicago. I [illegible]
years prior to this date. I [illegible]
in this tavern on January 8, 1944 [illegible]
I noticed and heard a group of people [illegible]
a booth located in the [illegible]
Michelle Ubiasi [illegible]
Amongst these people [illegible]
Perdew. I noticed Ubiasi [illegible]
four o'clock and [illegible]
tavern walked out. [illegible]
Perdew, the other [illegible]
of the tavern stayed. [illegible]
We are at gun-[illegible] Mr. [illegible]
the police will be [illegible]
tavern had been [illegible]
I was waiting to drive Mr. [illegible]
up and walked to the door [illegible]
the door to leave them out. [illegible]
outside of this tavern [illegible]
door. The man who [illegible]
a revolver from his pocket [illegible]
started kicking on the door [illegible]
got a gun. Mr. Ubiasi [illegible]
turned in head to me and said [illegible]
to the telephone and lift [illegible]
at Lake View 6071. At that time [illegible]
door on the inside of the [illegible] Ubiasi
look like stick-up. He had [illegible]
into the drawer and took out a revolver.
walked to the [illegible] towards the [illegible]
Ubiasi shouted 'halt'. I continued [illegible]
At this point he had reached the [illegible]
three men, but as you have [illegible]
two of them out [illegible]
one with his right [illegible]
Ubiasi fell to the floor. [illegible]
remarks whatever. William [illegible]
to the sidewalk and [illegible]
fired three more shots, [illegible]
Ubiasi. The police [illegible]
three men were still [illegible]
there. There were three officers who [illegible]
and at the point of gun [illegible]
and for Perdew to drop his revolver. [illegible]
officer then told me to go and call an ambulance.

The court entered an order granting defendant's motion [illegible]

to strike plaintiff's motion for summary judgment [illegible]

defendant leave to file an affidavit in opposition to plaintiff's motion, without prejudice to its motion to strike the motion for summary judgment. Thereupon defendant filed the following affidavit by William Perdew:

"I live at 722 Washington Street, Evanston. On January 26, 1944, I was a police officer in the employ of the City of Evanston. About 3:30 A. M. January 26, 1944, this affiant, together with one Charles M. Williams and one Gordon E. Carlisle, walked into a tavern known as the Log Cabin Inn, located at 1047 Wilson Avenue, Chicago. Affiant states that both he and his two companions sat in a booth, during which time affiant had two bottles of beer. Affiant states that he and his companions were waited upon, while in the booth, by a waitress in the employ of the tavern and that there was no commotion caused by either affiant or his two companions while in the Log Cabin Inn. Affiant denies that either he or his two companions, or anyone in the booth occupied by affiant during affiant's stay in the tavern, either said or shouted: 'Lock the place up we are staying.' Affiant further denies that anyone connected with the tavern or anyone purporting to be Mr. Ublasi then replied: 'We have to close on the hour, the police will be around so you must leave.' Affiant further states that during the time that he and his two companions were in the tavern he neither noticed or recognized the bartender, nor paid any attention to any of the employees of the tavern, with the exception of the waitress at the time affiant ordered beer. Affiant further states that after he had finished his two bottles of beer the waitress, who had waited on him and his party, came over to the booth and said: 'We are closing up.' Affiant and his two companions then left the Log Cabin Inn by the front entrance and walked about twenty feet west on Wilson Avenue. Affiant then states that one of his two companions then said: 'Let's go back and get some more beer.' Affiant's two companions then walked back to the Log Cabin Inn and opened the storm door. Affiant's companions then knocked on the inside of the door while affiant stood at the storm door. Affiant states that after his companions knocked on the inside door, affiant heard someone inside the tavern holler; 'We are closed.' Affiant denies that at this time he took out his revolver and kicked on the tavern door. Affiant further states that he never exhibited his revolver either during the time he was in the Log Cabin Inn, or at the time affiant and his two companions returned, and that all during this time affiant's revolver was in his right overcoat pocket. Affiant states that immediately after he heard someone inside the tavern shout: 'We are closed,' both affiant and his companions turned and walked east on Wilson Avenue towards Sheridan Road, intending to go to the Backstage Inn, located at 935 West Wilson Avenue. Affiant states that after he and his companions had left the Log Cabin Inn and walked about 150 feet east of the Inn on Wilson Avenue, affiant heard someone behind him say: 'Stick 'em up you sons of bitches and back against the window.' Affiant denies that he heard anyone shout: 'Halt,' and further denies that he heard anyone say: 'Put up your hands, I am holding you for the police.' Affiant states that when he heard the command to: 'Stick 'em up you sons of bitches and back against the window,' he immediately raised his left hand in the air and kept his right hand in his overcoat pocket, and then turned so that he could see the person who had issued the

defendant leave to file a motion to [illegible] motion, without prejudice to the motion to strike the motion for summary judgment. Thereupon defendant filed [illegible] by William Gardner:

"I live at [illegible] Washington Avenue, [illegible] 26, 1944, I was a police officer in the [illegible] Evanston. About 1:30 [illegible] with one Charles W. Williams and one [illegible] into a tavern known as the [illegible] Avenue, Chicago. Williams [illegible] sat in a booth. During which time [illegible] Affiant states that he [illegible] the booth, he a waitress [illegible] was in connection served by [illegible] in the leg [illegible] in. [illegible] conversations, or anyone in the [illegible] stay in the tavern, [illegible] are staying. Affiant [illegible] tavern or anyone accompanying [illegible] to close in the room, the [illegible] Affiant further states [illegible] conversations were in the tavern [illegible] bartender, nor with any [illegible] the [illegible] with the exception of the [illegible] beer. Affiant further [illegible] bottles of beer the [illegible] came over to the booth and [illegible] his two companions were [illegible] and talked about [illegible] states that one of his [illegible] just came more beer. Affiant [illegible] the log cabin inn [illegible] then knocked on the [illegible] storm door. Affiant [illegible] inside door, affiant [illegible] closed. Affiant [illegible] and kicked on the storm door. [illegible] exhibited his revolver either [illegible] inn, or at the time of last [illegible] that all during this time affiant [illegible] coat pocket. Affiant states that [illegible] inside the tavern amount [illegible] conversations turned and [illegible] road, intending to go to the [illegible] avenue. Affiant states [illegible] the log cabin inn and [illegible] Avenue, affiant heard someone [illegible] of bottles and back against the [illegible] heard anyone about: 'Hell,' and turning [illegible] say: 'Put up your hands, I am [illegible] states that when he heard the [illegible] bottles and back against the [illegible] left hand in the air and kept his right hand in his overcoat pocket, and then turned so that he could see the person who had [illegible] the

command. Affiant then saw in the hands of some individual unknown to affiant and whom affiant did not recognize, a revolver. Affiant states that this unknown person pointed a revolver at affiant, then said to affiant and his companions: 'Don't move or I'll let you have it.' Affiant then pulled his gun from his overcoat pocket and shot this unknown individual twice. This individual affiant later learned was one Nicholas Ublasi. Affiant states that after he had shot this unknown person twice, this person then fell to the sidewalk with his gun pointing and waving towards affiant. Affiant then fearing that this unknown person might still be able to shoot, fired three more shots at said person, who was later identified as Ublasi. Affiant states that immediately after the shooting two police squad cars arrived on the scene, and affiant immediately identified himself as an Evanston police officer, exhibited his star and turned his gun over to the police officer. Affiant further states that he never at any time recognized the person who ordered him to: 'Stick 'em up,' as anyone who had been in the Log Cabin Inn and affiant further states that he took said command to mean that it was a hold-up. Affiant further states that immediately after the shooting an individual, whom he later learned to be George Tindle, was near the scene. Affiant further states that he never recognized this individual as anyone he had seen before that evening in the Log Cabin Inn."

Plaintiff also filed the following affidavit by William Perdew:

"On Friday, October 20, 1944, when I gave an affidavit to Mr. Cannon [attorney for defendant] in his office, I told him the following information [in addition] to what is in the affidavit but he did not put it in that affidavit. On January 26, 1944 when we had left the tavern known as the Log Cabin Inn located at 1047 Wilson Avenue, Chicago, I together with Charles M. Williams and Gordon E. Carlisle walked out of the tavern, and then we walked back to the tavern. My two companions then walked back to the Log Cabin Inn with me and one of them opened the storm door and went to the inner door. While I myself did not kick on the door one of these companions did kick on the door at that time. I was standing about three feet from my companions leaning against the storm door. I heard a man's voice inside say at the moment 'One of you have a gun,' at this moment the inner door of the tavern had been opened and when we're all standing between the storm door and the open door of the tavern. At that moment I replied 'I know, I think I know how that came about.' We walked away. By making this remark, 'I think I know how this came about' I had in mind the fact that while we were in the tavern a girl whom I do not know was invited to sit at our booth by my companion Williams. When she sat next to me, on my right side, she felt my revolver in my right hand overcoat pocket and I felt in my mind that she had told the people in the tavern and the waitress that I had this gun. Although I did not hear anyone shout: 'Halt,' 'Put up your hands, I am holding you for the police', the man whom I later learned to be Ublasi and who came up with a gun may have said, 'Halt, put up your hands, I am holding you for the police' before he came close enough for me to hear him."

The court overruled defendant's motion to strike plaintiff's motion for a summary judgment and allowed plaintiff's motion for a summary judgment in the sum of $1,000, to reverse which this appeal is prosecuted.

[illegible]

The court overruled defendant's motion to strike plaintiff's motion for a summary judgment and allowed plaintiff's motion for a summary judgment in the sum of $[illegible], to reverse which this [illegible] is prosecuted.

Defendant maintains that the affidavits filed in support of the motion for summary judgment and the affidavit filed in opposition thereto created an issue of fact for a jury to determine. Plaintiff urges that her motion for summary judgment, supported by affidavits, showed conclusively her right to recover; that defendant's affidavit filed in opposition failed to show a good and meritorious defense; that the trial court was justified in determining that there was no issue of fact to be tried; that insured "was engaged in a legal act;" and that an arrest may be made by a private person without warrant for a criminal offense committed or attempted in his presence. We agree with plaintiff's statement that a motion to strike affidavits for summary judgment admit facts well pleaded, and that the court properly overruled defendant's motion to strike the motion and affidavit for summary judgment. In Bertlee Co. Inc. v. Illinois Publishing & Printing Co., 320 Ill. App. 490, we said (495):

> "The purpose of the summary judgment procedure is not to try an issue of fact but rather to determine whether there is an issue of fact. The method is necessarily inquisitorial. If there is a material issue of fact, it must be submitted to the jury. The right of the moving party to a judgment should be free from doubt."

In Shirley v. Ellis Drier Co., 379 Ill. 105, the Supreme Court said (110):

> "If there is anything left to go to the jury the motion for summary judgment is denied. If what is contained in the affidavits would have constituted all of the evidence before the court and upon such evidence, there would be nothing left to go to the jury, and the court would be required to direct a verdict, then a summary judgment will be entered."

Having these principles in mind, we turn to a consideration of the affidavits. The events from which the case arose occurred early Wednesday morning, January 26, 1944. The Log Cabin tavern, located at 1047 Wilson Avenue, Chicago, according to the ordinance regulating the numbering system, is on the south side of the street. The parties are in substantial agreement as to the time. Tindle states that Perdew, two other men and two women were in a booth in the

Defendant maintains that the [illegible] affidavits in support of the motion for summary judgment and the [illegible] in opposition thereto created an issue of fact [illegible] Plaintiff urges that [illegible] affidavits, [illegible] affidavit filed in opposition [illegible] defense; that the trial [illegible] there was no issue of fact [illegible] "legal act" and that an arrest [illegible] without warrant for a criminal [illegible] presence. He argues with plausibility [illegible] affidavits for summary judgment [illegible] the court improperly overruled [illegible] and affidavits for summary judgment [illegible]

Lubin v. Panish, [illegible]

"The purpose of [illegible] try an issue of fact but [illegible] issue of fact. The motion [illegible] is a material issue of fact, [illegible] right of the moving party [illegible]

In Shirley v. Mills, [illegible]

"If there is anything left [illegible] for summary judgment is denied. [illegible] affidavits would have constituted [illegible] upon such evidence, there would [illegible] the court would be required to [illegible] judgment will be entered."

Having these principles in mind, we turn [illegible] affidavits. The events from which [illegible] occurred early Wednesday morning, January 27, 1964. The [illegible] tavern, located at 1047 Wilson Avenue, Chicago, according to the testimony [illegible] the numbering system, is on the south side of the street. The parties are in substantial agreement as to the [illegible] that Perdew, two other men and two women were in a booth in the

back of the tavern. Perdew states that he was with Charles M. Williams and Gordon E. Carlisle and that a girl whom he did not know was invited by Williams to sit at their booth. The affidavits are silent as to what subsequently became of the women. Tindle states that after Ublasi announced the hour and that "We have to close," one of Perdew's group shouted: "Lock the place up, we are staying," and that Ublasi said: "We have to close on the hour, the police will be around, so you must leave." Perdew denies that he or any of his companions said "Lock the place up, we are staying", or that anyone purporting to be Ublasi replied: "We have to close on the hour, the police will be around, so you must leave." Perdew states that there was no commotion caused by him or his companions while in the tavern, and that he neither noticed nor recognized the bartender or any of the employees, with the exception of the waitress at the time he ordered beer. Tindle states: "They stood on the outside of the tavern on the sidewalk about eight feet from the door." Perdew states that after the waitress said: "We are closing up", he and his companions left by the front entrance and walked 20 feet west on Wilson Avenue. Tindle states that the man whom he later learned was Perdew, took out a revolver from his pocket and walked back to the tavern and started kicking on the door. Perdew denies that he took out his revolver, or that he kicked on the door, and states that he did not exhibit his revolver while in the tavern or at the time he and his two companions returned, and that during this time his revolver was in his right overcoat pocket. In the affidavit of Perdew, filed by plaintiff, he states that while he did not kick on the door, one of his companions did kick on the door, at which time he, Perdew, was standing about three feet from his companions leaning against the storm door. The insured commanded Perdew and his friends to "halt," if Tindle's statement is given credence, but

book of the tavern. Barker stated [illegible]
Williams and Gordon [illegible]
Shaw was invited by William [illegible]
are silent as to what [illegible]
states that Lieut. Elliot [illegible]
close," one of Barker's men [illegible]
staying," and that do not avail! [illegible]
the police will be around [illegible]
he or any of his companions [illegible]
or that anyone [illegible]
on the hour, the police [illegible]
states that Shaw [illegible]
while in the tavern, and [illegible]
bravado or any of the [illegible]
at the time he [illegible]
outside of the tavern [illegible]
Barker states that [illegible]
and his companions left [illegible]
west on Bloor Avenue. [illegible]
learned was Barker, took out [illegible]
book to [illegible]
that he took out his revolver, [illegible]
states that he did not exhibit [illegible]
at the time he and his companions [illegible]
the his revolver was in his right [illegible]
of Barker, filled by [illegible] [illegible]
on the door, one of his companions [illegible] the door, [illegible]
time he, Barker, was standing about three feet from [illegible]
leaning against the [illegible] door. The [illegible] [illegible]
his friends to "hell," if [illegible] statement [illegible] [illegible]

Perdew denies hearing any such command. Perdew also states that he did not hear Ublasi say "halt" or "put up your hands, I am holding you for the police", but admits that Ublasi may have so commanded before he came close enough for his voice to be heard by Perdew. It is significant that Tindle mentions that when Perdew and his companions left the tavern, he, Tindle, was still inside, but the affidavit is silent as to his, Tindle's, exact location.

Sec. 657, Ch. 38, Ill. Rev. Stat. 1945, reads:

"An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing the person to be arrested has committed it."

It is plaintiff's position that Ublasi had a right to arrest Perdew and his two companions, or one of them, for a criminal offense committed or attempted in his presence. The affidavit of Tindle quotes Ublasi as saying that "they look like stick-ups," and in this affidavit Tindle states that he, Tindle, saw Perdew take a revolver from his pocket and walk toward the tavern. Perdew and his party did not cause any disturbance in the tavern and when asked to leave, they left peaceably, after which the door was closed and locked. There was no robbery attempted by anyone in the presence of Ublasi, and there was a question of fact as to whether the actions of any of the parties constituted disorderly conduct. No general rule applicable to every case has been, or probably can be, announced as to what facts will constitute justification, in law, for an arrest without a warrant, other than that such ground of suspicion exist as should influence the conduct of a prudent and cautious man under the circumstances. Each case must be considered upon its own facts. People v. Kissane, 347 Ill. 385, 389; Carroll v. United States, 267 U. S. 132. To constitute one guilty of a crime as principal or as an accessory he must be present or participate or do some act at the time of

Perdew denies hearing any such remark. [illegible] did not hear Uhlaci say "halt" or "put u[illegible], [illegible] holding you for the police", but [illegible] before he came close enough [illegible] It is significant that [illegible] companions left the tavern, [illegible] affidavit is silent as to [illegible]

Sec. 657, Ch. 38, Ill. [illegible]

"An arrest may [illegible] without warrant, for [illegible] his presence, and by [illegible] fact been committed, [illegible] the person to be arrested has [illegible]"

It is plaintiff's position th[illegible] and his two companions, or one of [illegible] or attempted in [illegible] in saying that "they look like stick-[illegible] "I made sure that he, Uhlaci, [illegible] pocket and walk to [illegible] any disturbance in [illegible] presumably, after which [illegible] robbery attempted [illegible] a question of fact is [illegible] constitutes [illegible] case has been, or probably [illegible] constitute justification, [illegible] other than that such ground of [illegible] the conduct of a prudent and cautious [illegible] Each case must be considered upon its own fac[illegible] [illegible] v. [illegible], 347 Ill. 385, 399; Carroll v. [illegible] To constitute one guilty of a crime as principal [illegible] necessary he must be present or participate or do some act at the time of

the commission of the offense in furtherance of a common design, or if not present it must be shown that he by some affirmative act actually advised, encouraged, aided or abetted in the perpetration of the crime. People v. Bongiorno, 358 Ill. 171. The offense, if committed by Perdew or his companions, was a misdemeanor. In People v. Klein, 305 Ill. 141, the court said, 146:

"An officer, generally, may use a deadly weapon, even to the extent of taking life, if necessary to effect the arrest of a felon, for the reason that the safety of the public is endangered while such felon is at large; but the rule, by the great weight of authority both in this country and in England, is, that except in self-defense an officer may not use a deadly weapon or take life to effect an arrest for a misdemeanor, whether his purpose is to kill or merely to stop the other's flight. This is true, even though the offender cannot be taken otherwise. State v. Smith, 127 Iowa, 534; State v. Sigman, 106 N. C. 728; Conraddy v. People, 5 Park, Crim. (N. Y.) 234; Commonwealth v. Longhead, 218 Pa. 429; Forster's case, 1 Lew. C. C. (Eng.) 187; 5 Corpus Jurs, 426; Wharton on Homicide, (3d ed.) sec. 500."

If the death of the insured was caused by purely accidental means and not by reason of participation in an assault or felony, plaintiff should prevail. In a motion for summary judgment the right of the moving party to a judgment should be free from doubt, and a judgment can only be granted where the record shows there is no genuine issue as to any material fact. The affidavits show a conflict on material facts. We are of the opinion that the trial court erred in entering a summary judgment. The parties should be given an opportunity to try the issues of fact presented by the pleadings. For the reasons stated, the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions that the case be tried.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

the commission of the offense in [illegible]

or if not present it must be [illegible]

actually advised, encouraged, aided or [illegible]

of the crime. People v. Cowdrey, 38[illegible]

if committed by Perkins or his associates.

People v. Klein, 308 Ill. [illegible], the court [illegible]

"An accomplice, generally [illegible]
the extent of taking it, [illegible]
a relic, for the reason that [illegible]
warile such reform is at least [illegible]
authentic notes on his own [illegible]
self-defense or [illegible]
to offer an excuse for [illegible]
kill or merely to stop the [illegible]
though the offender secured [illegible]
Cone, 254 State v. Clemens, 10[illegible]
Iowa, 1916; State v. [illegible]
Forsteple case, [illegible]
on footing, [illegible]

If the [illegible]

means are not by [illegible]

plaintiff's brief. [illegible]

of the moving party to [illegible]

judgment can only be [illegible]

genuine issue as to any material [illegible]

on material facts. [illegible]

in entering a summary judgment. [illegible]

opportunity to try the issue [illegible]

the reasons stated, the judgment [illegible]

is reversed and the cause remanded [illegible]

ated.

JUDGMENT
REVERSED AND [illegible]

KILEY, P.J. AND LEWIS, J. CONCUR.

43031

327 I.A. 12

| | | |
|---|---|---|
| LILLIAN L. ROBINSON, Appellee, v. THE PEOPLES GAS LIGHT AND COKE COMPANY, a corporation, Appellant. | ) | APPEAL FROM SUPERIOR COURT COOK COUNTY. |

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover damages for personal injuries claimed to have been sustained by her at one of defendant's sales rooms, as a result of falling from a metal folding chair which collapsed as she sat upon it. At the close of all the evidence defendant moved for a directed verdict, which was denied. There was a jury trial and verdict and judgment in plaintiff's favor for $5,000. Defendant's motion for new trial was denied and defendant appeals.

On March 20, 1941, the plaintiff Lillian L. Robinson, went to the sales room of defendant Peoples Gas Light and Coke Company, a corporation, accompanied by one Hellstern, an employee of the defendant, to purchase a refrigerator. After examining some of the refrigerators on display and selecting one for purchase, she went to a room on the premises, accompanied by Hellstern and one Robert P. Barbour, manager of the branch sales office of the defendant. In this room, as Hellstern was about to prepare a written order for the purchase of the refrigerator, Barbour took a metal folding chair, which was closed and resting against the wall, and opened it and said to plaintiff, "Madam, would you care to sit down?" When plaintiff sat on the chair the right side collapsed and she fell to the floor, causing the injuries complained of. The floor upon which the plaintiff fell was dry and had a cork covering. At the time of the occurrence, plaintiff was 63 years of age and weighed 125 or 130 pounds.

45031

MILLIE I. MORRISON,

appellee,

v.

THE [illegible] COMPANY, a corporation,

appellant.

[illegible]

[illegible]

personal injuries claimed to have [illegible] of defendant's office room, [illegible] falling floor which collapsed [illegible] of all the evidence introduced [illegible] was error. There was a jury [illegible] plaintiff's favor for $[illegible], [illegible] was vacated and [illegible].

On March [illegible], 1941, [illegible] went to the [illegible] of [illegible] Company, a corporation, [illegible] of the defendant, to [illegible] some of the [illegible] who went to [illegible] one [illegible]. [illegible], manager of [illegible] defendant. In this room, an [illegible] partition [illegible] a metal folding door, which was closed and [illegible] wall, and opened it [illegible] to [illegible] to sit down?" [illegible] plaintiff sat on the [illegible] collapsed and she fell to the floor, [illegible] injuries [illegible] of. The floor upon which the plaintiff [illegible] was dry and had a cork covering. At the time of the occurrence, plaintiff was 65 years of age and weighed 185 or 190 pounds.

The gist of the amended complaint is that the defendant, through its agent or servants negligently and carelessly offered and set up a certain folding chair for the plaintiff to sit upon, which was in a dangerous and unsafe condition, which could or should have been discovered. Defendant filed an answer denying all the charges of negligence.

Plaintiff's theory is based on the doctrine of res ipsa loquitur. Defendant contends that it has no application since all the facts and circumstances "of how the accident occurred are in evidence." Errors relied on for reversal by the defendant are: giving and refusal of certain instructions; admission of statements alleged to have been made by Barbour, one of the defendant's employees, subsequent to the accident; and that the judgment is against the manifest weight of the evidence.

The evidence disclosed that the metal folding chair in question had a seat about 14½ inches wide, the front of which was 17½ inches from the floor and sloped to the rear where it was 15½ inches from the floor. The front legs extended from the floor above the seat forming a rounded back. The seat was fastened on each side to the legs by metal bolts. It also appears that when the cause was reached for trial one of defendant's witnesses, Robert P. Barbour, had left the city to visit his son who had been injured in an airplane accident. In order to dispense with the presence of the witness at the trial, defendant's attorney prepared a stipulation setting forth what the witness Barbout would testify to were he present. This stipulation was subsequently read to the jury by agreement of counsel. From the stipulation it appears that there were three chairs of the same type in the sales room of the defendant on the day of the accident; that they were cleaned regularly by the maintenance people, who had instructions that if they found anything broken or damaged in the equipment or furniture it was to be reported immediately;

The gist of the amended complaint [illegible] is that the defendant, through its agent or servants negligently [illegible] and set up a certain folding chair for the plaintiff to sit upon, which was in a condition [illegible] conditions, which [illegible] have been discovered. Defendant filed [illegible] charges of negligence.

Plaintiff's theory [illegible] locution. Defendant contends that [illegible] the facts and circumstances [illegible] evidence." Proper [illegible] giving and refusal of [illegible] alleged to have [illegible] employees, [illegible] against the contention [illegible].

The evidence [illegible] question was a seat [illegible] 17½ inches from the floor [illegible] inches from the floor. The [illegible] the seat forming [illegible] side to the legs [illegible] cause was reached for trial [illegible] Harbour, had left the city to visit [illegible] in an airplane accident. In [illegible] the witness at the trial, defendant's [illegible] testimony setting forth what the witness [illegible] This stipulation was subsequently read to the jury by agreement of counsel. From the stipulation it appears that there was a chair of the same type in the police room of the [illegible] at the time of the accident; that they were cleaned regularly by the maintenance people, who had instructions that if they found anything broken or damaged in the equipment or furniture it was to be reported immediately;

that these chairs were checked periodically by defendant's maintenance department, and that the chair in question had been found, from all outward appearances so far as an inspection could be made, to be in good working order, not worn or weak or defective in any of its parts; that the chair had been used a day or two before the accident at a salesmen's meeting held in the room in which plaintiff was injured; that on the day of the accident the witness Barbour took the chair and unfolded it without observing anything broken or defective; that at no time during the period that the chair in question had been used or during the time that the witness had occasion to use it had anything unusual happened in reference to the operation or use of the chair; that "after Mrs. Robinson had slid off this chair to the floor and after they had picked her up, Mr. Barbourpicked up the chair and looked it over and observed that the head of the rivet, or whatever part it was that fit into the slot and where the chair had folded, had come out of that slot, but the rivet was not broken nor was the slot worn but appeared to be the same size as the one on the opposite side; that this chair was kept there at this warehouse for a short time, for about a month or two after this occurrence; it was not repaired, but after that period of time it was disposed of by junking it."

Defendant maintains in its argument that whatever presumption plaintiff's testimony raised was overcome by the evidence of the defendant which not only described the occurrence of the accident but explained how it actually happened. Defendant argues in effect that since defendant's uncontroverted evidence shows that the chair in question was examined regularly by defendant's employees, coupled with the explanation of its collapse, namely, that the rivet pulled

that these objects were crowded [illegible]
department, and that the chair in question [illegible]
all outward appearances so far as can be [illegible]
be in good working order, [illegible]
its parts; that the chair had been [illegible]
accident [illegible]
the injury; that on the day [illegible]
took the oath and [illegible]
or detective; [illegible]
question had been used [illegible]
occasion to use it had [illegible]
the operation [illegible]
fell off this [illegible]
Mr. Sarnourplobed [illegible]
the back of the chair, [illegible]
slot and where the chair [illegible]
the river [illegible]
the same time [illegible]
that there is [illegible]
or was after this [illegible]
[illegible] like it [illegible]

Defendant [illegible] in it [illegible]
plaintiff's testimony [illegible]
defendant which not only [illegible]
but explained how it actually happened. [illegible]
that since defendant's uncontroverted [illegible]
in question was examined regularly [illegible]
with the explanation of its collapse, [illegible]

out of the slot, absolves defendant from all liability.

In the recent case of Johnson v. Stevens Bldg. Catering Co. 323 Ill. App. 212, it appears that plaintiff, a patron of defendant's restaurant, was injured by the contents of a decanter of hot tea which broke and spilled when she attempted to remove the cork. Defendant there made the same contentions as are made in the present case. The court said, at page 218:

> "It is the province of the jury to determine as a question of fact whether the evidence introduced by a defendant in explanation of the occurrence is consistent with due care on his part and also to determine the credibility and probability of such evidence."

We think the doctrine of res ipsa loquitur is applicable to the instant case. The rule is well established that the question whether the defendant offered such an explanation of the accident as to relieve itself of the presumption of negligence was a question of fact for the jury. (O'Hara v. Central Ill. Light Co. 319 Ill. App. 336; Styburski v. Riverview Park Co., 298 Ill. App. 1.) In the instant case, plaintiff was an invitee of defendant's agents Hellstern and Barbour. No attempt was made to charge her with any dereliction of duty when she unsuspectingly sat on the chair offered to her by Barbour. The question whether the prima facie case as disclosed by the plaintiff's evidence was overcome or rebutted by the defendant's evidence was one of fact for the jury.

Defendant's next contention is that the court erred in denying defendant's motion to strike the following question and answer:

> "Q. Was anything said to you by Mr. Barbour at the time?
>
> "A. Yes, Barbour was examining the chair. He said it was a chair that should not have been used, that it had been broken and put away."

The plaintiff's evidence shows that the fall from the chair caused her to be "completely spent, knocked out, for some time" and that she remained on the floor "five or ten minutes". Her reply to the question indicates that Barbour examined the chair in question after she

out of the sight, absolver defendant from all liability.

In the recent case of Johnson v. [illegible]

320 Ill. App. 212, it appears [illegible] restaurant, was injured [illegible] which broke and spilled when [illegible]. Defendant [illegible] case. The court said, [illegible]:

"It is the province of the [illegible] of fact upon [illegible] of the occurrence [illegible] to determine the [illegible] proximate [illegible] to think [illegible] instant case. The [illegible] the defendant offered [illegible] relative to [illegible] fact for the jury. ([illegible] 320) Hayworth v. [illegible] instant case, [illegible] and second, [illegible] of duty when [illegible] harbour. The question [illegible] by the plaintiff's evidence [illegible] evidence was one of [illegible] the jury.

Defendant's [illegible] denying defendant's motion [illegible]

"[illegible] anything [illegible] at, [illegible]

"[illegible] Yes, I [illegible] a chair that should not have been used, [illegible] and put away."

The plaintiff's evidence shows that she fell from the [illegible] to be "completely stunned, knocked out, for some time" and [illegible] remained on the floor "five or ten minutes". Her reply to the question indicates that Barbour examined the chair in question after she

fell from it. Admission of this testimony tended to show that defendant knew of the defective condition of the chair. This, defendant was unable to refute, since the witness Barbour was out of the city during the trial. The effect of it therefore was bound to be highly prejudicial to defendant. The alleged statement having been made after the accident, it was not part of the res gestae. (Chicago Union Traction Co. v. James C. Daly, 129 Ill. App. 519, 522; Lecklieder v. Chicago City Ry. Co., 142 Ill. App. 139; Lawndale Steam Dye Works v. Chicago Daily News, 189 Ill. App. 565; Springfield Con. Ry. Co. v. Puntenney, 200 Ill. 9; Illinois Central R. R. Co. v. Wade, 206 Ill. 523, 533.) On the question of defendant's liability, plaintiff's case rested solely on her own testimony. Under these circumstances the question and answer which defendant moved to have stricken may have had a controlling influence upon the jury in reaching a verdict.

Defendant complains of two instructions given at the request of plaintiff and two requested by defendant which the court refused to give. As to the first given instruction complained of (defendant's brief p. 39), we think the objections urged are without merit. A similar instruction was approved in Roberts v. Economy Cab Co., 285 Ill. App. 424, 430. The second given instruction (defendant's brief, p. 41) is substantially correct though a recasting of the phrase "for the purpose of its customers and invitees" would tend to clarify it. (Fabst v. Hillman's, 293 Ill. App. 547, 553.) In view of the issues and the evidence in the instant case, the trial court properly refused the instructions requested by defendants (defendant's brief, pp. 42,43).

Since the judgment must be reversed for the erroneous admission of evidence and the ruling of the trial court on defendant's motion to have the question and answer stricken, we shall not extend this opinion by passing on the other points raised by the defendant.

For the reasons indicated, the judgment of the Superior Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

KILEY, P.J. AND BURKE, J. CONCUR.

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REVERSED AND REMANDED.

KILEY P.J. AND BURKE, J. CONCUR.

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defendant knew of the defective condition [illegible]
defendant was unable to [illegible]
of the city during the trial. [illegible]
to be clearly insufficient [illegible]
having been made after [illegible]
costs. (Chicago Union Traction Co. [illegible]
App. 612; [illegible] Lochlinder v. [illegible]
Lewdale Iron Dye Works v. [illegible]
Springfield Con. Co. v. [illegible]
R. R. Co. v. Wade, 107 Ill. [illegible]
liability, [illegible]
Under these circumstances [illegible]
moved to have [illegible]
jury in rendering a verdict.

Since the judgment [illegible]
admission of evidence [illegible]
motion to move the [illegible]
this solution [illegible] depending on the [illegible]

For the reasons [illegible]
Court is reversed and the [illegible]

[illegible]

MILNY F.J., [illegible]

43075

| | | |
|---|---|---|
| W. A. ASHMORE, et al., Appellees, v. J. A. WOLF, Appellant. | ) | APPEAL FROM SUPERIOR COURT COOK COUNTY. |



MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered in favor of plaintiffs in an action at law based upon a written agreement between the parties involving the sale of certain oil royalties on parcels of land in the State of Oklahoma. After a hearing by the court without a jury, defendant's motion for judgment on the pleadings, stipulation of facts and evidence was overruled.

The essential facts are uncontroverted. The parties entered into a written contract on January 8, 1927 (Plffs' Ex. "A"), which provided, in substance, that plaintiffs agreed to reconvey to defendant by deed certain oil royalties, and the defendant, in turn, was to convey certain oil royalties to plaintiffs. The defendant "agreed to use his best efforts at all times to sell any and all interests in said royalties" deeded to plaintiffs and that the aggregate amount of the sales should yield plaintiffs $7500 with interest at 8 per cent annually and, in the event the proceeds of the sales made by the defendant did not yield the sum of $7500 and interest on or before July 8, 1928, the defendant would pay the difference to plaintiffs. The written agreement further provided that any payments received by plaintiffs as royalties from the oil-bearing lands conveyed to them by defendant should be considered as credits on the $7500 indebtedness of the defendant. The defendant failed to make any sales of oil royalties

W. A. ASHMORE, et al.,

Appellees,

v.

J. A. WOLF,

Appellant.

[illegible]

[illegible]

[illegible]

of plaintiffs in a [illegible]

between the parties involving [illegible]

on parcels of land in [illegible]

the court without a jury, [illegible]

affirmed, [illegible]

The [illegible]

entered into [illegible] which provided, in substance, [illegible] defendant by [illegible] in oil [illegible] turn, was to convey [illegible] oil [illegible] defendant agreed to [illegible] any and all interests in oil [illegible] and that the aggregate amount [illegible] $7500 with interest at 8 per cent [illegible] proceeds of the sales made by the [illegible] of $7500 and interest on [illegible] would pay the difference to plaintiffs. [illegible] further provided that any payments [illegible] royalties from the oil-bearing lands conveyed to [illegible] should be considered as credits on the $7500 [illegible] defendant. The defendant failed to make any [illegible] oil [illegible]

or make the payment of $7500 with interest, as required under the terms of the written agreement, to the plaintiffs on or before January 8, 1928. Thereafter, during the period commencing February 16, 1932 until February 23, 1938, payments were made, at varying intervals, to the plaintiffs by the Kingwood Oil Company, one of the lessees of the oil-bearing lands which defendant had conveyed to the plaintiffs under the terms of the agreement. It appears that the defendant had no knowledge of the amount of these payments or when they were made, and that the plaintiffs gave him no notice thereof.

On January 6, 1930, the defendant sent the following letter to the plaintiffs:

"January 6, 1930.

Ashmore Brothers,
Zanesville, Ohio

Gentlemen:

I am sending you herewith a map covering the part of Oklahoma, where you have some royalty interest. The section in which you own an interest is marked in red. Below I will give you a detailed report on each of your royalties. [Detailed Report Omitted].

I have prepared this report for you to the best of my ability and knowledge of condition in the fields. Everything points toward 1930 as a good oil year, and Gentlemen permit me to tell you this much, even if you have not made any money on the investment on your royalties, that does not mean that there never can be any money made out of it. I know you will. Please do not get discouraged, and say to hell with oil. It is the biggest industry in the country, and you most relize condition that prevailed during the last two years.

Some of the districts in which you own royalty interests look might good to-day, and I will not ask you to buy another Dollars worth of royalties from me, untill I have made good on the former investments.

Thanking you for the business that you have intrusted with me, and with my sincere complimets of the season, I am

Most Respectfully yours,
J. A. Wolf (Signed)"

JAW/MP

Judgment was entered in favor of the plaintiffs and against the defendant for $16,772.53, after crediting him with the sum of $381 for oil royalties received by plaintiffs from the Kingwood Oil Company.

The trial court rested its decision upon the grounds (1) that the payments made by the Kingwood Oil Company, a stranger to the contract, removed the bar of the statute of limitations, and (2) that defendant's letter of January 6, 1930 contained a new promise.

It is not controverted by the parties that the written agreement (Plaintiffs' Exhibit A) was breached by the defendant on January 8, 1928, and that the present suit was filed on December 27, 1939, a lapse of almost twelve years after the breach of contract. Defendant contends plaintiffs' cause of action is barred by the statute of limitations.

The questions presented for determination are whether the payments made by the Kingwood Oil Company and credited to defendant without his knowledge, and defendant's letter of January 6, 1930, are sufficient in law to preclude defendant from interposing the bar of the statute of limitations.

Statutes of limitation are designed to accelerate the settlement of controversies and therefore favored. (Bd. of Underwriters v. Industrial Co., 332 Ill. 611, 615; Desiron v. Peloza, 308 Ill. 582, 587.)

Among the cases cited by counsel for defendant in support of his contention he stresses the recent case of Joseph v. Carter, 382 Ill. 461. There the court said, at page 467:

"Payment resulting in law in a new promise which would take the case out of the Statute of Limitations, is only that designedly made as a payment upon the note." (Citing Lowery v. Gear, 32 Ill. 383.)

To sustain his position, counsel for plaintiffs cites authorities from other states, but we think the question determined in the Joseph case is so nearly analogous to the one presented in the instant case that it should control. Cases involving this question are reviewed in 25 American Law Reports, Annotated at

The trial court rested its decision [illegible] found (1) that the payments made by the [illegible] (2) [illegible] to the contract, removed the [illegible] at the time of [illegible] and (3) that defendant's failure of [illegible] new promise.

It is not [illegible] agreement (Plaintiff's [illegible] January 8, 1929, [illegible] 27, 1929, a letter [illegible] Defendant concedes [illegible] statute of limitations.

The [illegible] the payments made by [illegible] defendant without its [illegible] 8, 1929, [illegible] posing two [illegible] statute [illegible] settlement of [illegible] Underwriters v. [illegible] 306 Ill. 582, 587.)

Among the [illegible] support of his contention [illegible] Carter, 386 Ill. 481. [illegible] "Payment [illegible] take the case out of the [illegible] designedly made or a promise [illegible] Ibid. [illegible] 386 Ill. 582.)

To sustain his position, [illegible] authorities from other states, but we think the [illegible] in the Joseph case is so nearly analogous to the [illegible] the instant case that it should control. [illegible] question are reviewed in '29 American Law Reports, [illegible]

page 58. It appears that the weight of authority supports the rule adopted by our Supreme Court. (Carroll v. Forsyth, 69 Ill. 127, 133; Wanamaker & Brown v. Plank, 117 Ill. App. 327, 331; Friedlund v. Gunnally, 319 Ill. App. 36, 49.)

As to defendant's letter of January 6, 1930, plaintiffs contend that the new promise is lodged in that portion which reads as follows:

"Some of the districts in which you own royalty interests look might good today, and I will not ask you to buy another dollars worth of royalties from me, until I have made good on the former investments."

The rule has long been established that when a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. (Bell v. Morrison, 1 Peters 351; Carroll v. Forsyth, 69 Ill. 127, 131; Harden et al. v. Whitman, 209 Ill. App. 106.) We think the language of the letter is equivocal and vague, leading to no certain conclusion. Moreover, it makes no reference to defendant's obligation to pay plaintiffs $7500 with interest and that he is liable and willing to pay it. It is capable of many constructions, and among them, as defendant suggests in his brief, "that the defendant would not try to sell the plaintiffs any more royalties until the royalties already sold to them had paid out."

The judgment entered herein gave the defendant credit for certain royalties paid directly to plaintiffs by the lessees. It is stipulated (Abst. 19, 20) that the defendant did not know how much the aggregate sum of these royalties was. It follows, therefore, that defendant did not know how much he owed plaintiffs. Under

[illegible] 88. It appears that [illegible] the [illegible] rule adopted by our [illegible] court. [illegible] 127, 133; Lansdale & Brown v. [illegible] Friedlund v. [illegible] 111 [illegible]

[illegible] contend that the new [illegible] [illegible] follows:

[illegible] have right [illegible] to do, [illegible] will [illegible] dollars worth of royalties from [illegible] former [illegible]

[illegible]

[illegible] to be [illegible] be in [illegible]

the [illegible]

[illegible]

[illegible]

[illegible] v. [illegible]

[illegible] 111. [illegible]

[illegible] and [illegible]

[illegible]

"[illegible] will [illegible]

[illegible]

[illegible]

the [illegible] [illegible]

to them [illegible]

[illegible]

certain royalties [illegible]

is stipulated ( [illegible] 20) [illegible]

much the aggregate sum of those royalties [illegible]

that defendant did not know how much he owed [illegible] Under

these circumstances, any offer by the defendant to make good on the "former investments" would, at best, only be an offer to pay a conjectural balance, because the specific amount due was unknown to him when the letter was written. We are not able to extract from its contents a clear and express acknowledgment of a then subsisting debt. (Bell v. Morrison, 1 Peters 351, 366-367; Parsons v. Northern Ill. Coal & Iron Co., 38 Ill. 430; Norton v. Colby, 52 Ill. 198.)

Since defendant's letter does not infer a new promise and the payments made by the Kingwood Oil Co. and credited to plaintiffs are not sufficient to remove the bar of the statute of limitations when subjected to the tests laid down in the cases hereinabove cited, the defendant's motion, at the close of the case, for judgment on the pleadings, stipulation of facts and evidence, should have been allowed.

For the reasons indicated, the judgment of the Superior Court is reversed.

JUDGMENT REVERSED.

KILEY, P.J. AND BURKE, J. CONCUR.

these circumstances, any other [illegible]
"former investments" would, at best, only be [illegible]
constitutional balance, assuming [illegible]
to this when the letter was written. [illegible]
from the contents of [illegible] substitution, etc. (Dent v. [illegible]
v. Harrison [illegible] 32 III. 499.)

Since determining [illegible]
the payments made [illegible]
are not entitled to receive [illegible]
when subjected to the [illegible]
the determination [illegible]
the findings, although [illegible]
allowed.

For the reasons [illegible]
Court is reversed.

DUNN

[illegible], C.J., [illegible], J., [illegible]

43127

FRANCES E. SCHMIDT,
Appellant,
vs.

BERNICE SCHMIDT EDMONDS, MARION EDMONDS, RICHARD CASTON EDMONDS, ADELA DAMMERAU, HELEN D. JASPER, and THE NORTHERN TRUST COMPANY, an Illinois corporation, as executor and trustee of the Last Will and Testament of Oscar F. Schmidt, deceased,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

A 113

32 I.A. 413

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff Frances E. Schmidt filed a complaint to contest the will of her father Oscar F. Schmidt. At the close of plaintiff's evidence the court, on motion of the defendants, directed the jury to find the issues in favor of the defendants. A decree was entered on the verdict of the jury dismissing the complaint for want of equity. Plaintiff appeals.

The bill of complaint alleged that Oscar F. Schmidt died October 2, 1942, leaving the instrument in question which was admitted to probate as his last will. Under its terms, after bequeathing small sums to a niece and his wife's sister, the residue of his estate was divided equally as follows: one-half to the defendant Mrs. Bernice Edmonds, a daughter; and one-half to The Northern Trust Company, an Illinois corporation and to its successors in trust, with directions to pay the entire net income from the trust estate to the plaintiff. The grounds upon which it is sought to set aside the will are the want of testamentary capacity on the part of the testator, and undue influence on the part of the defendant Bernice Edmonds. Defendants filed answers denying the allegations of the complaint with regard to testamentary capacity and undue influence.

The principal question presented for determination is whether the record discloses any evidence tending to prove the

allegations of the complaint. Plaintiff introduced the testimony of eight witnesses. William H. Anderson, a bell boy employed by the Hyde Park Hotel for a period of eight years, testified that he went to the apartment of Oscar F. Schmidt about fourteen times a month during the period commencing in the early part of 1939 until the spring of 1940. On the occasion of his first visit Schmidt told him that there was someone in his room and the witness looked under the bed and in the closets and in both rooms. "After I looked under the bed and in the closets, he told me to stay with him, as his wife was trying to jump out of the window. I stayed a few minutes. After that he was crying and telling me about his wife trying to jump. On the occasions that I went to his room Mr. Schmidt told me that there was someone in the room, and about his wife. After I would get through looking under the bed and in the closets, he would start crying and tell me the same thing about his wife. Only once did I find anybody in his room and that was Miss Schmidt (the plaintiff). I never had any other conversations with him except those on the nightly visits. These calls used to come in about two or three o'clock in the morning. He kept the lights on all the time. I went up there three or four nights in a row sometimes and then I would skip a night. It was always the same thing when I went up there, over and over again."

Winifred Miriam Taylor testified that she was a graduate nurse and first met Oscar Schmidt on the night of January 3, 1940 in his apartment at the Hyde Park Hotel. "He said, 'Oh, I just saw a little crippled man in the corner. I saw him just before I took my bath, as I was taking off my shoes. He comes and goes and he is disappearing now.' When I got to the apartment on the night of January 4, Mr. and Mrs. Schmidt and Frances (plaintiff) were in the living room. He was very angry when he saw me and told me he was not going to let me remain that night because I had spent the previous night snooping around."

[illegible] stations of the commonwealth. [illegible] of eight witnesses. [illegible] by the jury [illegible] that he went to the [illegible] three months during [illegible] 1889 until the spring [illegible] Commonwealth told him that [illegible] witness looked [illegible] "After I looked under [illegible] stay with him, as [illegible] stayed a few minutes [illegible] about his wife [illegible] room was [illegible] about his wife. [illegible] in the closets, [illegible] about his wife. [illegible] then we [illegible] conversation [illegible] girls went to [illegible] [illegible] four months in [illegible] was always [illegible] [illegible] graduate nurse [illegible] 3, 1890 in his apartment [illegible] just saw a little cripple man [illegible] I took my bath, as I was [illegible] he is disappearing now." When I got [illegible] night of January 4, Mr. and Mrs. Bonnell [illegible] were in the living room. He was very angry [illegible] told me he was not going to let me remain that night because I had spent the previous night snooping around."

Mrs. Anna Blight testified by deposition that she had been engaged as a practical nurse for ten years in different homes in the city of Chicago; that she was employed as a nurse for Mrs. Schmidt from January 7 until March 19, 1940, while they lived at the Hyde Park Hotel; she worked from 7 o'clock in the evening until 7:30 in the morning. "He would say, 'I just don't remember, Mrs. Blight, and if you ask me things and I don't answer you correctly you will know that I mean to but I just don't remember.' One night I went to sit down on a chair and Mr. Schmidt said, 'Please don't sit on that chair; if you do you are going to sit on that little child who has no arms or no legs.' That last remark was made some time between January or February 1940. I would say that Mr. Schmidt's conversations were at times coherent and intelligent and at times not. Basing my observation on the conduct of Oscar F. Schmidt during the time that I was employed in his household and by reason of my conversation with him, I formed the opinion that he was not able to understand and appreciate the nature and consequence of handling his business affairs."

Dr. Harold S. Hulbert testified that he was a physician and surgeon licensed in Illinois and had practiced for twenty-five years. During his practice he had been associated with the State Psychiatric Hospital in the State of Michigan; that he served as a psychiatrist and consultant to the Naval Hospital at Great Lakes; that he had been a resident physician of the Chicago State Hospital at Dunning, taught nine years part time at the University of Illinois College of Medicine, and was a member of the staff of the Research Educational Hospital there; that the nature of his practice had been neuro-psychiatry, nervous and mental diseases. The witness further testified that he met Oscar F. Schmidt twice, the first time in 1939 in the chambers of

Judge Fisher, when he was with him about an hour. The next time he saw him was in January 1940 at the Hyde Park Hotel where he remained with him about two and a half hours; that Schmidt was alarmed about conditions, where he was, and alarmed about his wife's health; that he was alarmed about the Indians that sat on the side of the window ledge of his apartment; that little men and Indians came there at night and menaced him; and that he protected himself and wife against them with a hammer and a knife and asked for relief and he could not get it. The witness further testified that based upon his observation of Oscar F. Schmidt and his conduct at the time, he was of the opinion that Schmidt "was a senile, mentally afflicted, dependent person, a little bit out of his head," and that the condition was progressive and permanent.

Plaintiff introduced the testimony of four other witnesses. We shall not extend this opinion by reviewing their testimony, since it either did not tend to prove any of the allegations of the bill of complaint or was adverse to the plaintiff.

A motion for a directed verdict in a will contest is governed by the same rules which govern such motion in actions at law. The party resisting such motion is entitled to the benefit of all of the evidence in his favor, and the only question on review is whether there is <u>any</u> evidence in the record tending to prove the complaint. (<u>Hunt</u> v. <u>Vermilion County Children's Home</u>, 381 Ill. 29, 31; <u>Ryan</u> v. <u>Deneen</u>, 375 Ill. 452, 455.) The sole question is whether the evidence, when considered to be true, together with all legitimate inference to be drawn therefrom, tends to prove the plaintiff's case. (<u>Walaite</u> v. <u>Chicago, R. I. & P. Ry. Co.</u>, 376 Ill. 59.)

In <u>Libby, McNeill & Libby</u> v. <u>Cook</u>, 222 Ill. 206,212,

Judge Eisner, when he was [illegible]
he saw him was in January, 1940 [illegible]
remained with him about two [illegible]
alarmed about conditions, when [illegible]
wife's health; that he was [illegible]
set on the side of the [illegible]
little men are [illegible]
that he protected [illegible]
a little [illegible] for [illegible]
Further testified that [illegible]
and his counsel [illegible]
"was a senile, weak [illegible]
out of his head," and that [illegible]
government.

Plaintiff [illegible]
witnesses. [illegible]
testimony, since it [illegible]
allegations of the [illegible]
plaintiff.

A motion for [illegible]
is governed by the same rules [illegible]
at law. The party resisting [illegible]
benefit of all of the evidence in his favor, [illegible]
on review is whether there is any evidence [illegible]
to prove the complaint. Grant v. Terminal Transit Co., [illegible],
381 Ill. 29, 31; [illegible] v. [illegible], 275 Ill. [illegible]. The only
question is whether the evidence, when considered [illegible] true,
together with all legitimate inferences to be drawn therefrom,
tends to prove the plaintiff's case. (Malatte v. [illegible], [illegible]
& F. Mfg. Co., 374 Ill. 39.)

In Libby, McNeill & Libby v. Cook, 329 Ill. 308, [illegible]

the court said:

"If, however, there is in the record any evidence from which, if it stood alone, the jury could 'without acting unreasonably in the eye of the law,' find that all the material averments of the declaration had been proven, then the cause should be submitted to the jury." (Citing cases.)

While there appears to be a conflict in the testimony given by plaintiff's witnesses, the trial court is not permitted to weigh the evidence to determine where the preponderance lies.

It is undisputed that the will in question was executed on June 28, 1940. Dr. Hulbert testified that he observed Schmidt in January 1940 and that "senility is a permanent progressive affair and the delusions of senility and the dependency of senility are both progressive." Where a mental condition is once shown to exist, if it is of a continuous nature it will be presumed to continue. (Todd v. Todd, 221 Ill. 410,413; Milne v. McFadden, 385 Ill. 4,15.) Anna Blight saw Schmidt every night for more than two months up to March 19, 1940. We think her testimony, coupled with that of plaintiff's other witnesses, which has been recounted, when taken as true, together with all legitimate inferences which may be drawn therefrom in favor of plaintiff, tends to prove the allegations of the complaint with respect to Schmidt's want of testamentary capacity.

For the reasons indicated, the decree entered herein on February 9, 1944 is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

KILEY, P.J., and

BURKE, J., concur.

the court said:

"If, however, there is in the record any evidence [illegible] stood alone, the jury could [illegible] the eye of the law' [illegible] decisively [illegible] to the jury." (Citing cases.)

While there [illegible] plaintiff's witnesses, the [illegible] the evidence to [illegible]

[illegible]

June 20, 1960. [illegible]

[illegible]

[illegible] the defendant's liability [illegible]

[illegible] decisively." [illegible]

[illegible] it is a [illegible]

[illegible] (Citing [illegible]

[illegible]

two months [illegible]

with [illegible] plaintiff's [illegible]

[illegible]

may be drawn therefrom [illegible]

[illegible] of the conflicting [illegible]

testimony [illegible]

For the reasons [illegible]

on February [illegible] is reversed [illegible]

new trial.

[illegible]

KINEY, Ind., and

BURKE, J., concur.

Gen. No. 10015 Agenda No. 2

In the Appellate Court of the
State of Illinois
Second District

May Term, A. D. 1945

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| Ora D. Barnhart, Executor of the Last Will and Testament of Gerald A. Barnhart, Deceased, Plaintiff-Appellee, v. David S. Martin, Defendant-Appellant. | Appeal from the Circuit Court of Kane County |

Dove, P. J. :



This is an automobile collision case, here on appeal from a judgment of the circuit court of Kane County, for $5000.00 on the verdict of a jury, against David S. Martin, appellant, in favor of the executor of the last will of Gerald A. Barnhart, deceased, who was killed in the accident. The cause was tried on the first two counts of the complaint, alleging wrongful death. The first count charges general negligence, and the second, wilful and wanton misconduct. Two other counts, charging destruction of the decedent's automobile, were withdrawn. Motions to direct a verdict for the defendant on the wilful and wanton count, and on the negligence count, and each specification thereof, were denied, and the verdict was general.

The accident occurred about one o'clock P.M. on October 19, 1943, a clear and dry day, at the intersection of Garfield and Lancaster Avenues in a residential district of the City of Aurora. The decedent was driving alone east on Garfield Avenue, and appellant, a minor, accompanied by a companion, was driving south on Lancaster Avenue. Lan-

caster Avenue ends one block south of Garfield Avenue, and the traffic on the latter is much heavier than on Lancaster.

The grounds urged for reversal are that there is no evidence to support the negligence count, and that, in any event, the verdict and judgment are against the manifest weight of the evidence thereunder; that there is no evidence to support the wilful and wanton count, and because of the presumption that the general verdict was based on that count, the granting of a new trial is imperative; that there is a fatal variance because the complaint alleges that the defendant's car struck that of the decedent, while the proof shows that the decedent's car sideswiped the defendant's car; that the court erred in refusing each of the motions to direct a verdict, and in refusing to grant a new trial, in the admission and exclusion of testimony; in refusing to grant a new trial because of prejudicial conduct of appellee's counsel, and in the giving and refusal of instructions.

The northwest corner of the intersection is vacant property, approximately 100 feet on Garfield and 105 to 110 feet on Lancaster, and there are homes on the other three corners. It is about 15 feet from the sidewalk on Garfield Avenue to the curb line. There are some bushes on the corner lot for a distance of 40 or 50 feet from the inside of the North sidewalk on Garfield, and trees at regular intervals in the parking along both streets. There were no eye witnesses to the accident except the defendant and his companion. The impact occurred at or near a manhole about the center of the intersection. After the accident, the decedent's car pursued a somewhat erratic course generally southeast about 100 feet to the south curb of Garfield, where it struck and damaged the rear end of another car standing there, and turned

over onto its left side. Most of the damage to the standing car was to the trunk. There was no damage to the front end or the right side of the decedent's car. The decedent was thrown through the right door and his body was found about 90 feet from the point of impact. The front end of the defendant's car was caved in, the hood knocked off, the bumper smashed, and the front end of the frame which was of quarter inch channel iron, was bent to the left. The left side of the decedent's car, including the left cowl, left door, left rear fender, and the whole left side of the body housing was driven in and beyond repair. The chassis of this car was damaged, the rear housing which was of quarter inch iron through which the rear axle runs, was driven back and damaged to the extent that it could not be repaired.

While there is some confusion in the testimony, such as is to be generally expected in cases of this kind, as to the extent and exact location of marks on the pavement, the testimony shows that from the point of impact there were scrub marks in a curve from the wheels of the defendant's car, about the center and on the south half of Garfield Avenue, and skid marks, obviously because of applied brakes, from the wheels of the decedent's car, for about 50 feet, leading toward where it turned over. A witness for the defendant testified that the south skid mark passed over the south corner of the manhole. At any rate, the decedent's car skidded along the pavement after the collision, and decedent was thrown to the opposite side of the car from which he was sitting and through the right hand door. The forward motion of this car would account for his body being found farther on.

The defendant, called as an adverse witness under

section 60 of the Civil Practice act, (Ill. Rev. Stat. 1943, chap. 110, par. 184) testified that he crossed the street north of Garfield at 10 miles an hour, increased his speed to about 20 miles an hour in the middle of the block, and slowed down to about 10 miles an hour as he reached Garfield; that when he was about 30 to 40 feet up Lancaster, he looked up Garfield and was not able to see directly because of obstructions; that he could not answer how tall the bushes were nor whether they were in leaf; that the trees, some of them probably 35 to 100 feet away, and those farther up Garfield, 150 to 175 feet away, obstructed his view; that there is a house on the north side of Garfield about 140 feet from the corner and about 35 feet north of the curb line, and that from the point mentioned on Lancaster, one can see up Garfield only about 140 or 150 feet because the houses prevent seeing farther, and that he did not then see the decedent's car; that he looked to the right a second time when he was at the sidewalk line, and, notwithstanding the trees, saw the decedent's car coming about 150 feet away, around 50 miles per hour; that his own car was going 10 miles an hour, and he increased his speed 2 or 3 miles an hour for about 10 or 12 feet, and proceeded on because the other car was "so far down the street;" that he then looked to the left, and again looked to the right a third time when he was at the curb line, and saw decedent's car coming about 40 to 50 feet away, in the center of Garfield Avenue; that at the time of the accident he had stopped, or nearly stopped his car, in three or four feet, maybe less, with the front end about 10 feet out from the north curb line and at least 5 feet from the center line of Garfield, and that the back end had not reached the intersection; that theleft side of the decedent's car, about the front wheel, ran into the front end of his car, the rear bumper of the decedent's car catching in

the grill work of his car, and that the effect of the collision was to pull his car forward, three, four or five feet from where it was stopped or nearly stopped. On cross examination he said he had the decedent's car in his vision for 40 to 50 feet, and was almost in the center of the intersection. He further testified that his car was in top mechanical condition, with good brakes, that his eyesight is perfect, that he had 2½ years driving experience, and that, traveling at the rate of 12 or 13 miles an hour on a dry pavement, he could stop the car, by using the brakes, in 3 or 4 feet.

While appellant claims that his car came to a stop in the north half of Garfield Avenue, several other witnesses testified that it came to rest near the curb at the southeast corner of the intersection, and his companion testified that after the collision it went south "maybe 15 feet." This witness also testified that they were going 20 miles an hour at the intersection, about 15 miles an hour as they entered it, and about 3 to 5 miles an hour at the curb line, and that as the decedent's car kept coming with no effort to stop, he hollered to the defendant to watch out; that the brakes were then on and the car had stopped. His answers on his previous examination at the coroner's inquest tend to discredit his statement that the brakes were on and that the car had stopped. Furthermore, why he would holler to the defendant to watch out after the car had stopped, is not apparent.

A police officer testified that soon after the accident he asked the defendant if he had seen the decedent's car approaching, and that the defendant replied: "I don't know where the devil he came from." The owner of the standing car testified to a similar statement by the defendant to him, which was not denied. The defendant admitted making the statement to the officer. His attempted explanation that he did not understand the officer's question, and did not know whether the decedent had turned a corner

or had come straight, and that he thought maybe he had come from a house, or something like that, is not plausible or credible.

It is true, as claimed by appellant, that when there are two or more counts in a complaint, one charging general negligence, and another charging wilful and wanton misconduct, and the verdict for the plaintiff is general, as it was in this case, the presumption is that the verdict is based on the wilful and wanton count. (Greene v. Noonan, 372 Ill. 286, 291.) Consequently, if the judgment in this case be upheld, it must rest upon the proofs under the wilful and wanton count, and it is not necessary to consider the assignments of error under the negligence count.

Ill will is not a necessary element of a wanton act. To constitute an act wanton, the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, make a case of constructive or legal wilfulness. (Clarke v. Storchak, 384 Ill. 564, 580; Bartolucci v. Falleti, 382 Ill. 168.) In Nosko vs. O'Donnell, 260 Ill. App. 544, 551-553, the court points out four classes of cases which our Supreme Court regards as establishing wanton and wilful misconduct; (1) where the defendant has inflicted an intentional injury; (2) Where the defendant has failed to exercise ordinary care where a known and extraordinary danger is imminent (Walldren Express & Van Co. v. Krug, 291 Ill. 472); (3) Where a defendant through recklessness, regardless of the danger to another, has carelessly failed to

to discover an extraordinary and impending danger which could have been discovered by the exercise of ordinary care (Brown v. Illinois Terminal Co., 319 Ill. 326); (4) carelessness so gross in its nature as to indicate a mind reckless and regardless of consequences (Bremer v. Lake Erie & Western Railroad Co., 318 Ill. 11.)

There is also another familiar rule of law that on a motion by a defendant for a directed verdict, the testimony, with all reasonable inferences to be drawn therefrom, must be taken in its aspect most favorable to the plaintiff. (McGregor v. Reid, Murdoch & Co., 178 Ill. 464, 471.) If there is in the record any evidence from which, if it stood alone, the jury could, without acting unreasonably, in the eye of the law, find that all the material averments of the complaint have been proven, a verdict should not be directed. (Devine v. Delano, 272 Ill. 166, 179; Libby, McNeill & Libby v. Cook, 222 Ill. 206.) The cases cited in Nosko v. O'Donnell, supra, also hold that ordinarily the question of whether a defendant is guilty under a wilful and wanton count is a question for the jury, provided there is any evidence in the record from which a jury can reasonably find that the defendant is guilty of such conduct.

According to the defendant's own testimony, when he was at the sidewalk line he saw the decedent's car coming at 50 miles an hour only 150 feet away, and could have stopped his own car in 3 or 4 feet. He was an experienced driver and must have been conscious that he could not cross in front of the approaching car, or at least that it was hazardous in the extreme to attempt doing so. Nevertheless, he increased his speed and proceeded. A few feet farther on he again could have stopped at the curb line, where he saw the other car only 40 to 50 feet away, and was warned by his com-

panion, but still proceeded into the path of the oncoming car. The court also had before it the violence of the collision, demonstrated by the condition and location of the two cars after the accident, and the fact that it was so great that the decedent was thrown across his car and through the right hand door and was killed. Under these circumstances and the settled rules of the law, the trial court correctly refused the motion to direct a verdict, and correctly submitted the cause to the jury.

It is also apparent from the extensive damages to and the location of both cars after the accident, the scrub marks and skid marks on the pavement, and the obvious violence of the collision, that the jury were warranted in believing that the defendant's car was proceeding at a much higher rate of speed than he claims. It is obvious, from his own testimony, that the house 140 feet from the corner and 35 feet north of the curb line, would not obstruct his view to the west on Garfield from a point 30 to 40 feet north on Lancaster. That the bushes on the lot did not obstruct his view, appears from the testimony of a patrolman, who testified that the only obstruction to view observed by him was the trees. From this testimony and that of the other police officer and the owner of the standing car, the jury were warranted in believing that he did not look up Garfield Avenue from a point 30 or 40 feet north on Lancaster, or he would have seen the decedent's car. Furthermore, he thereafter had two ample opportunities to stop and avoid the accident after he saw the decedent's car approaching. His conduct meets the definition of wilful and wanton misconduct as repeatedly laid down by our Supreme Court in the cases above cited. The jury were also warranted in believing that the defendant's car ran into the decedent's car, as alleged in the complaint, and the claim as to variance

is without merit. Our conclusion is that the proofs sufficiently show the defendant's guilt under the wilful and wanton count.

It would unnecessarily prolong this opinion to discuss in detail the admission and exclusion of testimony urged as a ground for reversal. We have examined the same and find no prejudicial error in the rulings of the court.

Under the claim of prejudicial conduct by appellee's counsel, it is urged that asking the defendant if he refused to testify at the coroner's inquest on the ground that he might incriminate himself, constitutes reversible error. The court sustained an objection to the question, and, in chambers counsel for appellee stated that the defendant's testimony, as a whole, was to the effect that he did not do anything that was wrong and obeyed the law in every respect; that his statement at the coroner's inquest was entirely inconsistent with his testimony on the trial, and was offered for the purpose of impeaching and discrediting his testimony on the trial. The court again sustained the objection to the question. If the defendant's story as related on the trial was true, he would not be justified in having any fear of the consequences in telling such a story at the inquest. Under some circumstances the asking of such a question might be highly prejudicial, but in the instant case, this question being asked by way of impeachment, and an objection thereto being sustained, we are of the opinion that it did not constitute reversible error. We find no merit in the criticism of other conduct of appellee's counsel sufficient to reverse the judgment.

The tenth instruction does not direct a verdict. Its alleged vice, if any, is cured by the third complained of

given instruction for each of the parties, and considered together, they state the rule of law correctly, as held in numerous cases.

The eleventh instruction as to wilful and wanton misconduct is the same in effect as the defendant's 12th instruction, and he cannot complain of it. A similar instruction was approved in Robeson vs. Greyhound Lines, 257 Ill. App. 278.

It is claimed that the 12th instruction requires the jury to examine the complaint to ascertain what acts of wanton and wilful misconduct are charged therein, but the first instruction tells the jury exactly what acts of wanton and wilful misconduct are charged in the complaint. That instruction also distinguishes the elements of wanton and wilful misconduct from those of negligences. While it is a peremptory instruction, the jury could not have been misled by it, and we find no reversible error therein.

The substance of the defendant's second refused instruction is covered by other given instructions, and there was no error in refusing it.

We find no reversible error in the record and the judgment of the trial court is affirmed.

Affirmed.

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| JOSEPHINE WANTROBA, Appellant, v. CHICAGO SURFACE LINES and COMMONWEALTH EDISON COMPANY, a corporation, Appellees. | APPEAL FROM SUPERIOR COURT, COOK COUNTY. |



MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action against the defendants, Chicago Surface Lines and Commonwealth Edison Company, for damages for personal injuries, and on trial by jury, at the close of the evidence for plaintiff each of the defendants made a motion for a directed judgment in its favor. The motion of the Chicago Surface Lines was allowed, that on the Commonwealth Edison Company denied. A motion of plaintiff for a new trial was overruled, and there was judgment on the directed verdict in favor of the Surface Lines and against plaintiff, from which she appeals.

The contention of the plaintiff is that the court erred in allowing the motion for a directed verdict and in denying her motion forba new trial. These are the controling questions.

The occurrence in which plaintiff was injured took place on April 20, 1944, in Chicago, at the intersection of 18th with Throop Street. 18th Street runs east and west, Throop Street north and south. The railway lines run east and west on 18th Street. Plaintiff worked for Donnelley & Sons and, on her way to work, became a passenger on one of the cars of the defendant Surface Lines. It was a "one man car", that is a car in which the motorman also acted as conductor from his seat in the front end of the car. The time of the occurrence was about 7:30 in the morning.

The street car was moving east. Plaintiff sat on the second seat from the front door and next to the aisle. Plaintiff says: "I was looking straight East as the car came to Throop Street. I saw the Edison truck coming north on Throop St. and it made a left turn going west on 18th St. It was going pretty fast. The street car was going pretty fast, about 25 miles an hour. When the street car and truck came together, I was knocked off the seat next to the aisle and hit my right side of the head against the other seat next to the aisle, and my right chest, right hip and my right wrist. I was raised from the floor. The conductor took my name and address. I got off the street car while it was standing and took the next car behind us. I was helped on the next street car." She also says she took an hour off that morning because her head, chest, hip and wrist bothered her, and that in the afternoon she rested for a half hour because she was not feeling good and was getting dizzy spells. She left her work at 4:30 and went home, took a cup of coffee and went to bed. As she was in pain she stayed in bed all next day, and the doctor was called. He gave her medicine and advised her to stay in bed. She went to the doctor's office twice a week for about two months.

On cross-examination plaintiff said she didn't remember how far back from Throop Street the street car was when she first saw the truck; that the street car was still moving at that time; that it was going pretty fast as it approached Throop Street, did not stop to take on any passengers at Throop Street and did not stop at any time until it hit the truck; that "The truck was in front of the street car. The street car did not slow up or take on any passengers at this street corner".

The conductor, Charles J. Kassel, was also walled as a witness by plaintiff. He said it was a nice day, the streets were dry, it had not been raining that day at all before the accident. He was working as a relief man. He was going east down 18th Street

The street car was moving east. [illegible]
from the front door and [illegible]
was looking straight East as [illegible]
the Gibson trucks coming north on [illegible]
turn going east on 14th St. [illegible]
car was going pretty fast, about [illegible]
car and struck some [illegible]
the side and hit [illegible]
next to the sidewalk, and my [illegible]
wrist. I was thrown from the [illegible]
and shoulder. I not [illegible]
took the next car home [illegible]
She also came the [illegible]
doctor, him and [illegible]
needed for a half hour [illegible]
the dizzy spell. [illegible]
took a cup of coffee [illegible]
stayed in bed all [illegible]
medicine and advised [illegible]
office twice a week for about [illegible]

On cross-examination [illegible]
her far back from Broadway [illegible]
now the trucks; that the street [illegible]
that it was going pretty fast [illegible]
not stop to take on any passengers [illegible]
stop at any time until it hit [illegible]
front of the street car. The [illegible]
on any passengers at this street corner".

The conductor, Charles J. Farrell, was also called as a witness by plaintiff. He said it was a nice day, the streets were dry, it had not been raining for a day at all before the accident. He was working as a relief man. He was going along on 14th Street

to Throop Street. Passengers were waiting for his street car. He tried to make a stop and a truck came north on Throop Street, cut across and struck his car. The left front part of the street car came in contact with the left rear part of the truck. When he first saw the truck with reference to the intersection it was about 2 feet south of the crosswalk on Throop Street and had not yet reached the intersection. The truck was going about 15 or 20 miles an hour. He watched the truck from the time he first saw it until the impact occurred and had his eyes on it constantly. He saw the truck on Throop Street make a left turn. His street car was 10 or 12 feet west of the crosswalk, going about 4 or 5 miles an hour. The front of the street car was about 2 or 3 feet west of the walk. He says: "I was going to stop. The truck was going about 15 or 20 miles an hour, as it made this turn into front of street car and at the very moment before the impact occurred. The truck was going west. It cut left and turned and faced on the eaatbound angle". He did not know the weight of the street car. There were approximately 25 or 30 persons on the street car just before the accident. He sounded the gong from the time he first saw the truck 2 feet south of the intersection and the street car was about 12 or 15 feet from the west side of Throop Street when he first sighted the truck. He was coming to a stop at the intersection to take on or let off passengers. The truck was on the left side when it reached the corner and cut around the southwest corner catching his car. It did not go out in the middle of the street. The left front end of his car contacted the truck near the left rear wheel. The street car was moving at the time of the impact, coming to the intersection. He had to pull the car back to the depot because it was damaged. He did not know what run he had made the day before. He did not have a regular run. He was a relief man, an extra man, at that time on 18th Street. Practically his only occupation up to that time had been as a conductor on a

to Jamoop Street. Passengers were waiting for [illegible]
He tried to make a stop and a [illegible]
street, out across and across [illegible]
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was about 2 feet south of the [illegible]
not yet reached the intersection. [illegible]
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saw it until the front [illegible]
he saw the truck on [illegible]
car was 10 or 12 feet [illegible]
miles an hour. [illegible]
west of the walk. He [illegible]
going about 18 or 20 miles [illegible]
of street car and at the very [illegible]
the truck was going east. [illegible]
southbound cars". [illegible]
there is a [illegible]
before the accident. [illegible]
saw the truck 3 feet south of [illegible]
was about 12 or 14 feet from [illegible]
He first sighted the truck. [illegible]
section to take on or let off [illegible]
left side when it reached the [illegible]
corner rounding the car. It did not [illegible]
at east. The left front end of his car [illegible]
the left rear wheel. The street car [illegible]
the impact, coming to the intersection. [illegible]
back to the depot because it was damaged. [illegible]
he had made the day before. He did not have a [illegible]
a relief man, an extra man, at that time on 12th Street. Previously
his only occupation up to that time had been as a conductor on a

two man car. The truck was in the middle of the street, and as it entered the intersection proceeded around the curb, making a sharp turn to the left, and ran into his car.

On cross-examination the witness stated that from the first time he saw the truck until the collision the truck traveled about 30 or 35 feet and the street car traveled about 12 or 15 feet.

This is the sum and substance of the evidence. Plaintiff was a pay passenger on the Surface Lines. She was entitled to the highest degree of care consistent with the practical operation of the railway and the mode of conveyance adopted. Kaldunski v. Chicago City Ry. Co., 250 Ill. App. 475, 478; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 113.

The rule applied in this state in passing on a motion for an instructed verdict for defendant at the close of the plaintiff's evidence is too well known to need citation of authorities. It is stated by the Supreme Court in Kelly v. Chicago City Ry. Co., 283 Ill. 640, 642. The court said:

> "The only question raised and preserved for review in this court on such motion is, does the evidence on the part of the plaintiff, if taken as true and most favorably considered for him, with all just inferences to be drawn therefrom, make out a prima facie case on the part of the plaintiff? The question of the weight of the evidence or the credibility of the witnesses cannot be considered. If there was any evidence in the record from which, standing alone, the jury might, without acting unreasonably in the eyes of the law, have found the material averments of the declaration to have been sustained, the motion was properly denied and the instruction refused. McGregor v. Reid, Murdock & Co. 178 Ill. 464; Libby, McNeill & Libby v. Cook, 222 id. 206; Devine v. Delano, 272 id. 186."

Applying this rule, we hold that the evidence in this case required the submission of the cause of plaintiff to the jury. The plaintiff was in no way negligent or responsible for the manner in which the street car was controlled. This conductor was inexperienced in controlling and operating this par-

ticular kind of car. He was sitting at the front and saw the truck approaching. He says he tried to slow up the car. The plaintiff's evidence on that point contradicts him. He was plaintiff's witness and while she could not impeach him generally as a witness she had a right to deny his testimony as to the slowing up of the car or any other fact with reference to the way in which it was managed. Chance v. Pingella, 310 Ill. 515, 523. One or the other or both of the defendants was guilty Turner v. Cummings, 319 Ill. App. 225. Defendant Surface Lines had a right to make its motion and stand on it if it so desired, but where there is any doubt under the evidence the trial judge may well (following the practice provided for in Smith-Hurd's Anno. Ed., Chap. 110, par 192, §58, p. 682, and the Supreme Court Rule 259.22, p. 547) deny the motion as to both parties and require the case to go to the jury. ( See Iopkowski v. Bergman, 304 Ill. App. 422.) We hold this should have been done under the circumstances here, and that it was error to direct a verdict. The judgment will therefore be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and Niemeyer, JJ., concur.

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| CLAIRE ELIZABETH MARTIN, Appellee, v. ROBERT E. MARTIN, Appellant. | APPEAL FROM SUPERIOR COURT, COOK COUNTY. |

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I.

In a suit by Mrs. Martin against her husband for separate maintenance, begun April 18, 1944, and on an amended and supplemental complaint, filed November 13, 1944, in the alternative for separate maintenance or divorce, and on a counterclaim by him, filed May 23, 1944, for divorce, after the causes had been put at issue and heard before the chancellor by testimony taken, the court on December 28, 1944, entered this order:

> "THIS CAUSE coming on to be heard on the contested trial calendar; the Court being fully advised in the premises, having heard the arguments of counsel, the plaintiff, Claire Elizabeth Martin, being represented by Norman Becker, her attorney of record, the defendant, Robert Martin, being represented by Irving Eiseman, his attorney of record; the Court having heard the testimony of the parties hereto and the witnesses and having jurisdiction of the parties and the subject matter hereof;
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant, Robert Martin, pay unto the plaintiff, Claire Elizabeth Martin, the sum of $500.00 as a reasonable fee for services rendered on her behalf, said $500.00 to be paid within thirty and sixty days from the date hereof."

On the same day the record shows the following order was entered:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant, Robert Martin, pay unto the plaintiff, Claire Elizabeth Martin, arrearage due and owing her as and for temporary alimony instanter."

On the following day (December 29, 1944) the record shows the following order:

> "THIS CAUSE coming on to be heard on the contested trial calendar; the Court being fully advised in the premises, having heard the testimony of the parties hereto and the witnesses and having jurisdiction of the parties and the subject matter hereof, and having heard the arguments of counsel for the parties hereto;
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint for Separate Maintenance and Amended and Supplemental Complaint for Divorce and Amended and Supplemental Complaint for Divorce or Separate Maintenance and defendant's Cross-Complaint for Divorce be and the same are hereby dismissed for want of equity."

February 16, 1946, defendant, [illegible] [illegible] Martin, prayed an appeal from the reversal of both [illegible], with directions that the prayer of his counterclaim for divorce should be granted.

II.

It is contended this order of December 29th should be reversed for the reason that no motion or petition for attorney's fees was filed after the filing of the amended and supplemental complaint for divorce or for separate maintenance, and the matter was not passed upon or reserved until the final hearing. As a matter of fact, each of plaintiff's complaints asked for temporary and permanent alimony as well as attorney's fees. A petition filed by her August 16, 1944, asking alimony and attorney's fees was pending and undisposed of when the order was entered. The order recites evidence was taken. Under Chapter 110 of the Civil Practice Act, §34, par. 3, it became the duty of the party appealing to preserve this evidence. Apparently it has not been preserved. Eich v. Eich, 277 Ill. App. 329. The question for this court on this point is whether

the trial court abused its discretion. We hold it did not. Porter v. Porter, 62 Ill. App. 107. The pleadings here are sufficient to show jurisdiction. It is quite true the order itself does not recite that it is made for and on account of attorney's fees, but the notice of appeal recites that it is on that account, and defendant cannot here contend otherwise.

III.

Mr. and Mrs. Martin have been litigating their marital affairs since April 18, 1944, when she filed her complaint for separate maintenance, charging extreme and repeated cruelty and misconduct with "Jane Doe". He answered, denying the charges, and filed a counterclaim for divorce, charging extreme and repeated cruelty, calling of bad names, jealousy without cause, malicious attempts of his wife to ruin his business, including destruction of the equipment of his office, and the excessive use of narcotics. He averred, as was necessary, that he had been a kind and affectionate husband. He charged extreme and repeated cruelty, naming the specific dates.

The sole issue here is whether Dr. Martin should be granted a divorce. While the record on that point is voluminous, the issue is clear and simple. He is appealing, not she. As to part of the evidence there is little or no conflict; as to other parts it is very conflicting.

IV.

The undisputed evidence shows that Dr. Martin, when about 30 years of age, went to Europe for post graduate study. There he met Mrs. Martin, a German actress in Berlin, who had been married, borne a daughter to her husband and had been divorced. She was 9 years older than he. They were attracted to each other. From Berlin he went to Vienna for further study. She went with him. She was pregnant. They returned to Berlin,

where, on September 21, 1939, they were married.

He returned to the United States in November, 1939. She followed, arriving here June 10, 1940. He attempted to have the daughter come also, but the outbreak of war with Germany prevented. His office and their home are at 1617 West 93rd Street.

Dr. Martin at first seemed to be very kind and attentive to his wife. He bought her dresses, furs and jewelry. He hired a tutor that she might learn our language more speedily. Shortly after coming here Mr. and Mrs. Martin met Mr. and Mrs. Karmin. Mrs. Karmin had a lawyer brother in Germany, named Koenigsberger, who had represented Mrs. Martin there in procuring her divorce from her first husband. Mrs. Karmin says there was a little trouble between the family of Dr. Martin, who then occupied the home property, and the new wife. However, the family moved out and seemed to have joined in placing the home and the office in the names of plaintiff and defendant in joint tenancy.

V.

In the autumn of 1942 at the Palm Grove Inn in Chicago, Dr. Martin met a young lady about 19 years of age, concerning whom there is much conflicting testimony in this case. She was serving as a waitress when he met her but seems to have had ambitions for nursing or the medical profession. A few days after they met she was at work in his office, and within a short time she was established as a part of his home. She continued to work for him until November, 1944, and up to two weeks before the time he testified in this suit. She was available but was not called as a witness by either party.

In the beginning the women got along together pretty well. With Dr. Martin, they took automobile trips to Wisconsin, ate meals together in public eating houses, enjoyed Grand Opera, etc. However, witnesses testified they noticed the younger

where, on September [illegible]

He returned to the United [illegible]
followed, arriving here [illegible]
the daughter [illegible]
prevented. [illegible]
others.

Dr. Martin at first [illegible]
to his wife. He [illegible]
a letter that she [illegible]
after coming home [illegible]
are. Martin had a key [illegible]
who had [illegible]
from her [illegible]
circumstances [illegible]
the home [illegible]
out and [illegible]
in the room [illegible]

[illegible]

In the [illegible]
Dr. Martin [illegible]
when there is much [illegible]
serving as a [illegible]
ambitions for [illegible]
after they met [illegible]
short time she [illegible]
tinued to work for him until [illegible]
before the time he testified in [illegible]
but was not called as a witness by either party.

In the beginning the women got along [illegible]
well. With Dr. Martin, they took automobile [illegible]
ate meals together in public eating houses, [illegible]
etc. However, witnesses testified they noticed the [illegible]

woman would sit in the front seat with the doctor and the wife in the rear seat. Other witnesses say they saw nothing indicating anything improper between them. The doctor testifies; that he went out with her on "professional business or in company with Mrs. Martin". Explaining the fact that he went to the room where she lived after she left their home, he says: "In her room she was typing diets and statements. I had no other help and she was well acquainted with my work, and she typed them in her apartment. I was paying her $40.00 a month. She was going to school in the daytime. She paid her tuition herself." The testimony of the plaintiff wife is to the contrary. She says: "I was not his wife any more." She says she saw them in bed together, and she says Dr. Martin replied to her protests, "I am tired of you, you are too old for me. I like only young women." She also says (and he does not deny): "I moved in another room in the house upstairs in the attic, and had no intimacies with him any more." He does not specifically deny this testimony nor does his sister, Mrs. Olesen, who was living with them much of the time, doing, she says, the work that the wife either could not or would not do.

Mrs. Martin's evidence is not all consistent with this high attitude, as where, at one time, she says that on an automobile trip to Wisconsin the three of them occupied the same bed. Her testimony as to their occupancy is corroborated by that of the manager of the hotel. Mrs. Martin explains her attitude on the ground that as yet she was not acquainted with the laws and customs of this country.

All the testimony is to the effect that the situation came to a place where there was quarreling all the time. The nearest neighbor, Mrs. Leonard, who lived next door, testifies that in the summer and fall of 1943 there was so much of argument that she had to move from one side of her house to the other. The testimony also shows that the employee and the wife about

woman would sit in the front seat [illegible]
wife in the rear seat. Other witnesses [illegible]
indicating anything improper [illegible]
that he went out with her on [illegible]
company with her. [illegible]
to the room where she lived [illegible]
"In her room she [illegible]
help and [illegible] all [illegible]
there in her nightgown. [illegible]
was going to submit to [illegible]
the testimony of the [illegible]
here: "I was [illegible]
and together [illegible]
"I am tired of you, [illegible]
woman." [illegible]
[illegible] undersigned
[illegible]
[illegible]
wife either [illegible]
[illegible]
high solicitude [illegible]
mobile trip to [illegible]
Her testimony [illegible]
the manager of [illegible]
on the ground that an yet she [illegible] not acquainted
and customs of this country.

All the testimony is to the effect [illegible]
came to a place where there was [illegible]
nearest neighbor, Mrs. Leonard, who lived next door, [illegible]
that in the summer and fall of 1943 there was so much of [illegible]
that she had to move from one side of her house to the other.
The testimony also shows that the employee and the wife about

that time came to blows, and that the younger beat up the older woman without protest on the part of her husband. In fact, on April 27, 1944, the wife was put out of the house and the husband had the locks changed on the doors in order to prevent her return. She was put out, the record indicates, without financial resources and lived more than a day in a bus station. Her Teutonic fighting spirit then got the better of her judgment and spurred on by unwise advice she bought an axe, broke into the home and office and destroyed much of the doctor's medical equipment. In fact, he claims she destroyed about $2300.00 worth of property. There was a fight in which the husband, his sister and wife all were somewhat injured. The doctor caused her to be arrested, and upon trial in the Municipal Court she was found guilty of malicious mischief.

The whole of the evidence indicates that the serious trouble between Dr. Martin and his wife came on shortly after the arrival of the younger woman. On cross-examination, however, he states: "I was not happy with my wife from the time she arrived. The trouble was manyfold. Just before I left Berlin she told me that if she did not like it in this country, she would gladly step aside and would not hinder me in my career, and she begged me to give her daughter a chance, who was half Jewish and who was being persecuted by the Nazis, and I said, for the sake of this girl, we would get married and we would give this girl a chance to start a new life in the United States, and she gave me her promise that she would never step in my way and would always be grateful for her chance to come to the United States. That was one of the reasons I married her."

VI.

The counterclaim of the defendant charges extreme and repeated cruelty in that on August 12, 1943, Mrs. Martin threw a heavy bottle with great violence, striking his face and causing

that time came to blows, and that [illegible]
woman without protest on the [illegible]
April 27, 1944, the wife was [illegible]
band had the locks changed [illegible]
return. She [illegible]
responsible [illegible]
testimony [illegible]
and support [illegible]
home and office [illegible]
ment. In fact, [illegible]
of property [illegible]
and wife [illegible]
[illegible]
ruling of [illegible]

The [illegible]
trouble [illegible]
arrival of [illegible]
stated: "I [illegible]
The trouble [illegible]
on which it [illegible]
[illegible]
me to give [illegible]
being [illegible]
girl, [illegible]
to start a [illegible]
promise that she [illegible]
grateful for [illegible]
one of the reasons I married [illegible]."

VI.

The counterclaim of the defendant [illegible]
repeated cruelty in that on August 12, 1945, [illegible] beat him three
a heavy bottle with great violence, striking [illegible] face and causing

loss of blood; that on April 29, 1944, she struck him with a hatchet, striking and cutting his wrist. He testifies to these incidents and to another in which he says she struck him with a frying pan because he asked her to prepare a late meal for one of his friends.

We have given considerable time to the unpleasant task of reviewing the evidence bearing on the charges of these two against each other. Dr. Martin contends he is entitled to a divorce and that the court erred in dismissing his counter-claim praying for it. Divorce is allowed only for innocent parties. Persons who are in pari delicto may not be granted a divorce. Duberstein v. Duberstein, 171 Ill. 13[illegible] at 145; Levy v. Levy, 388 Ill. 179, at 185. It is of course easy to distinguish any one of this class of cases from another as defendant attempts to do. In the trial court, in so far as the right of Dr. Martin to a divorce was concerned, the question for the trial judge was whether he had established his charges by a preponderance of the evidence and whether he was free from fault. If he was not free from fault, then, although she was guilty of the charges stated in his complaint, he was not entitled to the remedy of a divorce. That question primarily was for the chancellor, who saw and heard the witnesses and, therefore, had a great advantage not possessed by an appellate court in deciding the issue. He denied relief to either. The clear inference is that both were guilty, in his opinion.

In Dings v. Dings, 123 Ill. App. 318 at page 322, this court said:

> "It is a well established rule that the chancellor who saw and heard the witnesses is better qualified than is an appellate tribunal to judge the weight to be given to their testimony; and where the evidence of the witnesses is conflicting the decree will not be disturbed by this court on a question of fact, unless it appears to us that the findings of fact are clearly and palpably wrong."

In Eller v. Eller, 198 Ill. App. 411, we said:

> "Charges in bill and cross-bill being of same nature and character, and the evidence irreconcilably conflicting at most essential points, thus requiring close consideration of the witnesses' credibility, the Appellate Court will not disturb the decree or analyze the evidence."

Both orders will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

43436

327 I.A. 323

WILLIAM SIMON,
Appellee,

v.

WILLIAM NITZBERG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Nitzberg on March 2, 1945, gave notice of appeal from a judgment entered December 19, 1944, on the finding of the court. The suit was begun in the Municipal Court May 19, 1944. The statement of claim in three paragraphs asserted that defendant, operating as the Biltrite Upholstering Company, issued his check No. 15, dated September 13, 1943, on the Milwaukee Avenue National Bank of Chicago, payable to the order of plaintiff Simon for $426.36, in payment for money advanced; that the check was presented for payment and was returned by the bank endorsed, "Not sufficient funds"; that plaintiff requested defendant to pay the amount due on the check, which he refused to do. The statement also says that defendant, when he issued the check, knew well he did not have $426.36 on deposit at the bank, and that he would not have the amount there in time to honor the check when presented for payment at the bank on which it was drawn; that defendant issued the check with the intention of defrauding plaintiff; that plaintiff asked the judgment include a malice count, also interest at 5% from September 15, 1943. The statement of claim was verified by plaintiff. It was in contract and of the 4th class.

Summons issued under the seal of the court on May 19, 1944, and the summons and statement of claim bear a stamp by the clerk of the court, stating in large letters, "Malice, gist of the action, failure to appear, and defend, may result in imprisonment".

This was in conformity with Rule 6 (2) of the Municipal Court, which provides:

> "Where malice is the gist of the action, and a body execution is sought, plaintiff must allege the same in the statement of claim and cause the statement of claim and summons to be stamped accordingly by the clerk of the court."

Defendant appeared and demanded trial by jury of six, which he afterwards waived. Defendant at no time objected to the sufficiency of the statement of claim by motion to strike or otherwise. He filed an affidavit of defense and counterclaim which were stricken on motion of plaintiff, and afterwards a second amended affidavit of defense, on which the cause was tried.

The testimony of witnesses was heard and the argument of counsel. The court found the issues against the defendant also "Further finds Malice the gist of the action", assessed damages and entered a judgment upon the finding in the sum of $426.36.

Defendant filed a motion for a new trial. He did not at any time move to strike the statement of claim, and he did not, until his motion for a new trial, attempt to raise the question of former adjudication, either by pleading or evidence. He has not preserved the evidence by a report of the trial proceedings made a part of the record. On the motion for a new trial, for the first time he moved to quash the finding of malice and order that body execution issue. He presented a verified petition in support of these motions but neither asked nor obtained an order on plaintiff to answer the same. The motion to quash the finding and order was overruled and the judgment ordered to stand. On appeal the defendant now contends that the judgment should be reversed because it does not conform to the pleadings. He cites

This was in conformity with [illegible]

which provides:

> "There [illegible]
> body execution [illegible]
> the same in the [illegible]
> the statement of [illegible]
> stated [illegible]

Defendant [illegible]

which he afterwards [illegible]

the sufficiency of the [illegible]

otherwise. [illegible]

which were stricken on motion [illegible]

second amended affidavit [illegible]

tried.

The testimony of [illegible]

coun el. The court [illegible]

"Further finds [illegible]

damages and [illegible]

[illegible]

Defendant filed a motion [illegible]

any time move to strike [illegible]

until his motion for [illegible] to make [illegible]

of former adjudication [illegible]

not preserved the evidence [illegible]

made a part of the record. [illegible]

the first time he moved to [illegible]

that body execution issue. [illegible]

support of these motions but [illegible]

on plaintiff to answer the case. [illegible]

and order was overruled and the judgment [illegible] to stand. On

appeal the defendant now contends that the judgment should be

reversed because it does not conform to the pleadings. He cites

Mager v. Hutchinson, 7 Ill. 266; 2 Gill. 266, p. 271; and Tarnodd v. Smith, 281 Ill. App. 232. He argues that courts are limited in the scope and character of their judgments and decrees by the pleadings, and if they transcend their powers the judgment or decree is void and may be collaterally attacked at any time, citing Levine v. Sylden Metal Products Co., 252 Ill. App. 140. None of the cases are in point.

Rule 37 of the Municipal Court provides:

> "(1) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement; and if the pleadings do not sufficiently define the issues the court may order other pleadings prepared.
>
> "(2) No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet.
>
> "(3) All defects in pleadings, either in form or substance, not objected to in the trial court prior to trial, shall be deemed to be waived." (Municipal Court Manual, p. 24.)

These rules of the Municipal Court of Chicago permit pleadings in actions such as this to sound both in contract and in tort. The actions may be set up separately or may be joined. In the early history of the court it was decided the proof in a 4th class case would determine the character of the judgment. Edgerton v. Chicago, Rock Island & Pacific, 240 Ill. 311. The Supreme Court there held the form or kind of action in this kind of case is determined by the proof. The rule adopted has been consistently followed. Morse Hubbard Co. v. Michigan Central R. R. Co. and New York Central R. R. Co., 286 Ill. App. 163; Buchsbaum v. Halper, 265 Ill. App. 226; Walsh v. Fallis, 266 Ill. App. 341. Nor can the jurisdiction of the court be challenged successfully on this ground. The Supreme Court so held in

Mayer v. Hutchinson, 7 Ill. [illegible] 71; [illegible] Parnell v. Smith, 221 Ill. App. [illegible] are limited in the error and absence [illegible] decree by the pleadings, and if any [illegible] the judgment or decree [illegible] at any time, citing Perkins v. Spitler, [illegible] Ill. App. 144. [illegible]

Rule 37 of the [illegible] provides:

> "(1) If by the [illegible] or from the [illegible] modification otherwise [illegible] sufficient by [illegible] other pleadings [illegible].
>
> "(2) No pleading shall [illegible] which shall contain [illegible] reasonably inform [illegible] nature of the [illegible] your to meet.
>
> "(3) All [illegible] in pleadings, [illegible] substance, but [illegible] order to [illegible] (Smith's Jur. [illegible]).

These rules of [illegible] pleadings in actions [illegible] in tort. The actions may [illegible] In the early history of the court [illegible] with these rules could determine the [illegible] Edgerton v. Chicago, [illegible] Supreme Court there held the form or kind of [illegible] of case to be determined by the [illegible]. The rule [illegible] consistently followed. Jones Bu. and Co. v. Jackson National Ins. Co. and New York Central Ins. Co., 229 Ill. App. 132; Buchsbaum v. Haiper, 265 Ill. App. 326; Talab v. Leslie, 246 Ill. App. 241. Nor can the jurisdiction of the court be challenged successfully on this ground. The Supreme Court so held in

Baker v. Brown, 372 Ill. 336, reversing the judgment of the Appellate Court in the same case in 298 Ill. App. 173, which defendant cites and relies on. It is true, as defendant contends (citing Ingalls v. Raklios, 373 Ill. 404), that a finding that malice is the gist of an action must be included in the judgment where a body execution is to issue. In our opinion the judgment in this case conforms to that requirement.

Defendant argues he was tried in the Criminal Court under an indictment based on this same transaction and acquitted. He says the judgment there was res adjudicata of the issue here. The contention cannot prevail for two reasons. First, it was not raised upon the trial by pleading or offer of proof but for the first time on motion for a new trial. He cites Murgic v. Fort Dearborn Casualty Underwriters, 245 Ill. App. 361. That case, however, holds this defense to be good only "if properly presented and relied upon". It was not so presented. People v. Kissane, 261 Ill. App. 621, affirmed in 347 Ill. 385; Ropacki v. Ropacki, 354 Ill. 502, 506. However the defense would not have been good if presented. The parties in the Criminal Court and those here are not identical, nor are the issues. A similar question received full consideration by the Supreme Court in People v. Small, 319 Ill. 437 at pp.446-7, where the Supreme Court said:

> "There is no doubt about the general proposition that a matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction is deemed finally and conclusively settled in any subsequent litigation between the parties, where the same question or questions arise; (Chicago Title and Trust Co. v. National Storage Co. 260 Ill. 485; Markley v. People, 171 id. 260; Hanna v. Read, 102 id. 596;) but as a general rule this principle is not applicable where it is sought to use a judgment in a criminal prosecution to bar a subsequent civil suit arising from the same transaction. (Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778; State v. Bradneck, 69 Conn. 212, 37 Atl. 492; Micks v. Mason, 145 Mich. 212, 11 L. R. A.--n.s.--653; State v. Lewis, 164 Wis. 363, 159 N. W. 746; State v. Roach, 83 Kan. 606, 31 L. R. A.--n.s.--670.) As a foundation for the

rule that a record of a judgment in a criminal case is inadmissible in a civil suit it has been pointed out that there is a dissimilarity in objects, issues, results, procedure, parties to the action, rules of evidence, weight of evidence, burden of proof and competency of witnesses. Ordinarily, a judgment of acquittal in a criminal case is not even admissible in evidence in a subsequent civil suit. (Corbley v. Wilson, 71 Ill. 209; State v. Corron, 73 N. H. 434, 62 Atl. 1044.)"

The opinion goes on to say that in harmony with these general principles of law section 21 of division 2 of the Criminal Code provides in substance that nothing in the act contained shall be so construed as to prefent the party injured from having and maintaining a civil action for all damages and losses that he may have sustained in consequence of the commission of any criminal offense, and that no court shall allow or entertain the plea that the private injury is merged in the crime or in any manner affected by it.

The judgment will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

43462

327 I.A. 553

DANIEL JANOWSKI,
Appellant,

v.

GREAT LAKES TANK TRUCK LINE, INC., a corporation, and JEWEL TEA COMPANY, a corporation,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment entered on the verdict of a jury in favor of defendants, in an action to recover for personal injuries, caused, as alleged, by the negligence and wanton and wilful conduct of defendants and, also as alleged, their violation of certain statutes. Ill. Rev. Stat., Chap. 95 1/2, §§146, 211 (b), and 172. Defendants answered, denying the charges. The cause was tried by jury with the result stated, a motion for a new trial having been denied, this appeal followed.

Plaintiff contends for reversal that the verdict was against the manifest weight of the evidence; that improper evidence was admitted; that erroneous instructions were given at the request of defendants, and the defendants' attorney was guilty of misconduct.

The occurrence took place on March 5, 1942, at 3425 S. Kedzie Avenue in the City of Chicago. S. Kedzie Avenue is a public street running north and south and, at this point, through an industrial district. Two surface lines run parallel to each other on the street. The southbound cars run over the west tracks, and northbound cars run over the east tracks. Manufacturing plants are operated on land adjoining both sides of the street.

Plaintiff lived at 825 South Kedzie Avenue, was 29 years

of age and employed by the Rheem Manufacturing Company, located on the east side of this avenue. He earned $45.00 per week. He says on the morning of March 5th he took the southbound street car and arrived at its usual stopping place in front of the plant at which he worked. He got off the rear platform of the street car. He says 10 or 15 people got off with him. They and he went around the rear of the car and walked toward the east. He says he looked south and north; that he saw a large number of people crossing in front of the south end of the street car. He says the people were a solid mass on their way to the plant. He saw nothing else until the people in front of him scattered and jumped. He also jumped and saw the truck coming but couldn't get away from it fast enough. The people in front of him jumped. Some went back, some went on through, some fell down. The first he remembered after the accident he was picked up by a couple of fellows and carried on a stretcher to an ambulance. He says, "I was hit by the truck along my whole right side, leg, hip and arm." He was thrown several feet, against an automobile standing about ten feet north of the street car. He did not remember whether he was conscious or unconscious. He was taken to the first aid department of the Rheem plant. He suffered great pain. He had a fractured knee, which was keptbin a splint for 6 weeks, when he was discharged from the hospital as improved. He returned to the hospital June 12, 1942. His knee was still unstable, and he was operated on June 18th. The operation improved but did not cure his leg, and the medical evidence indicates severe and permanent injuries.

There is a sharp conflict in the evidence as to the precise manner in which this injury occurred. Two men, Eugene Brooks and Frank Wikoff, were in a southbound automobile, which had stopped a few feet behind the street car. Plaintiff was

thrown against their auto at the time he was hit. Brooks and Wikoff were employees of the Liquid Carbonic Company. They testify that with the help of a mailman they put plaintiff into their automobile, then a girl from the Rheem plant came over and told them where he worked, and they took him into the Rheem plant to the first aid office. They drove away without leaving their names with officers orbanybody. They appeared as witnesses for defendants at the trial. Their testimony tended to show that plaintiff got off the car alone, ran around the rear end of it and into the side of the tractor and trailer coming from the south.

On the contrary, John Kosiek, a patrol guard at the Rheem plant, and Evelyn Ligenza, a young lady 22 years of age, also an employee of the Rheem Manufacturing Company, gave testimony tending to corroborate that of the plaintiff as to the actual occurrence. They state in substance that a large number of people were walking with the plaintiff toward the factory, and that also a mass of people got off the front end of the car, and that the tractor trailer, driven by defendants' servant, drove through the crowd at a speed of about 25 miles an hour, striking plaintiff and injuring him.

Plaintiff's first contention is that the verdict is manifestly against the weight of the evidence. It is the duty of this court to examine the evidence and weigh it. We have done so but we do not think it necessary to decide this point because of other errors. If the evidence for plaintiff did not preponderate, it was at least close on the facts, and it was important the instructions should be accurate. Plaintiff contends the instructions were not accurate. The driver of defendants' tractor trailer did not testify. It appears he

thrown against their [illegible] Wikoff were employees of the [illegible] testify that with the help of [illegible] their automobile, then [illegible] and told them where he worked, [illegible] them plant to the [illegible] leaving their names [illegible] as witnesses [illegible] tended to show that of [illegible] the rear end of it and into [illegible] coming from the north.

On the contrary, [illegible] them plant, [illegible] also an employee of the [illegible] gave testimony tending to [illegible] as to the actual occurrence, [illegible] large number of [illegible] the testimony, [illegible] end of the car, and that the [illegible] dants' car [illegible] miles an hour, [illegible]

Plaintiff [illegible] manifestly against the weight of the evidence [illegible] of this court to examine the [illegible] done so but we do not think [illegible] because of other errors. If the evidence did not preponderate, it was at least close on the facts, and it was important the instructions should be accurate. Plaintiff contends the instructions were not accurate. The driver of defendants' tractor trailer did not testify. It appears he

was serving in the Army at the time of the trial. What attempts, if any, were made to procure his evidence does not appear. The only fact at issue in this case was whether plaintiff was guilty of contributory negligence.

Plaintiff argues the appeal as if the issue of wilfulness and wantonness had been submitted to the jury. The instructions for both parties hardly indicate this to be true. Defendants' brief says: "The plaintiff's counsel well knows that the question of willful and wanton misconduct was taken up at great length before his honor, Judge Trude, in chambers and that the willful and wanton feature of this case was not submitted to the jury". He does not point out any place in the record sustaining this contention. This court is bound by the record as it is. If plaintiff wished to withdraw his wilful and wanton charge he should have done so by dismissing as to that allegation. If the court desired the question of wilful and wanton conduct to be eliminated he should have instructed the jury to that effect. Neither of these things was done. However, we think plaintiff by the 5th instruction given at his request, and certainly by the 14th instruction so given, in effect withdrew the charge of wilfulness and wantonness from the jury. A plaintiff may try his case upon inconsistent counts, and if the evidence is sufficient both may be submitted to the jury, but such a situation requires great care in the requesting and giving of instructions. The negligence of plaintiff contributing to the injury for which he sues would be a defense to plaintiff's allegation of negligence on the part of defendants. It would not be a defense to the averment of wilfulness and wantonness, and an instruction as to the plaintiff's negligence failing to exclude the wilful and wanton charge would amount to a withdrawal of the wilful and wanton count by plaintiff. Buck v. Alex, 350 Ill. 167; Cipperly v. Carmack, 258 Ill. App. 593. The same principle

[illegible]

[illegible] in serving in the army [illegible] of [illegible]. [illegible] statements, if any, [illegible] to [illegible] account. The only [illegible] in this case [illegible] plaintiff was guilty of contributory negligence.

Plaintiff argues that [illegible] and contributory [illegible] [illegible] for [illegible] liability [illegible] [illegible] "[illegible] liability" [illegible] question of [illegible] length before [illegible] willful [illegible] the [illegible] punishing [illegible] [illegible] shown [illegible] if the [illegible] to [illegible] [illegible] of the [illegible] the [illegible] of willfulness [illegible] may be [illegible] is sufficient [illegible] affect on requires [illegible] instructions. [illegible] injury [illegible] tion of [illegible] on the part of [illegible] defense to the [illegible] instruction as to the plaintiff's negligence [illegible] the willful and wanton charge would amount to [illegible] of willful and wanton count by plaintiff. Ryan v. [illegible], [illegible] Ill. 167; Gipperly v. Gammack, 256 Ill. App. 500. The same principle

is applicable in actions to which the Insolvent Debtor's Act is applicable. Stoike v. Bonasera, 243 Ill. App. 281. We hold plaintiff, through the giving by the court of plaintiff's instruction No. 14, at his request, withdrew the wilful and wanton charge from the jury.

The court, at the request of defendants, gave this instruction: "If you find from the evidence that the plaintiff's injury was the result of an accident, caused without any negligence on the part of the defendants, you should return a verdict of not guilty." This sort of an instruction under circumstances such as are here shown by the evidence has been held erroneous by the Supreme Court and also by this court. Streeter v. Humrichouse, 357 Ill. 234; Mississippi Lime & Material Co. v. Smith, 282 Ill. App. 361, 369; Krawitz v. Levinstein, 320 Ill. App. 618. In the case first cited the Supreme Court said:

> "Turning to the instructions, the fifteenth instruction told the jury that if the death of the decedent was caused through 'accident purely' they should find the defendant not guilty. There was not evidence that McGann was injured through accident, alone, not coupled with negligence, and it was error to give this instruction."

In the Mississippi Lime & Material Company case (above cited) it is said:

> "We cannot escape the conclusion that this verdict is against the manifest weight of the evidence and that it was probably brought about by the injection into it of the theory of an accident by the charge of the court. It is easy for the lay mind to confuse negligent acts with accidental ones. As a matter of fact many lawyers use the word 'accident' when they mean 'injury'. The court told the jury in the face of what seems to us to be a clear case of negligence on the part of the appellees that notwithstanding that, if they believed it came about by an accident they would be warranted in finding the defendants not guilty. This part of the charge should not have been given in this case. Streeter v. Humrichouse, supra."

We think, too, there is some merit to the contention of

[illegible]

[illegible]

plaintiff that in the course of the examination of the witness Wikoff misleading evidence was improperly allowed to go to the jury. In the course of his cross-examination the witness was asked the question: "How did you see the truck on the opposite side fifteen feet away when you were watching this man on the opposite side?" He answered: "I seen the truck about the same time as the man seen it." Counsel for plaintiff moved to strike the answer because it was a volunteered statement and not responsive. This was overruled, we think erroneously. The trial court, however, made a bad situation worse by saying: "He should have said, 'the same as the man appeared to see it.'" Plaintiff complains that this statement by the court told the jury that "they could consider what appeared to the witness, with the court putting the words in the witness' mouth". The record shows that the witness, Wikoff, continued these irresponsive answers by stating a number of times: "I seen the truck the same time he did." Motions to strike were denied. It should have been stricken. In a case not close on the facts this might not constitute reversible error, but under the facts here we think it must be held it is.

Plaintiff also complains of statements made by the attorney for the defendants in his closing argument to the jury. The abstract, however, does not show that he made any objection at the time, and we think it is too late to make it here.

For the errors already indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and Niemeyer, JJ., concur.

[illegible]

O'Connor and Kleanyear, JJ., concur.

43518

| | |
|---|---|
| PERSONAL FINANCE COMPANY OF CHICAGO, a corporation, Appellant, | |
| v. | APPEAL FROM CIRCUIT COURT, COOK COUNTY. |
| EDWARD SILVER, Appellee. | |

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order entered March 5, 1945, dismissing plaintiff's suit for want of equity. The complaint was filed March 22, 1943, and prayed the foreclosure of a chattel mortgage on household goods. The complaint was in the usual form and prayed a foreclosure and sale for the satisfaction of the indebtedness found due. The cause was heard on a written agreement and stipulation of facts. Jurisdiction of the Circuit Court to hear such a cause is authorized by Section 24, Chapter 95 of Hurd's Illinois Revised Statutes, 1945, p.2205.

The agreement and stipulation as to facts are as follows:

"It is hereby stipulated and agreed by and between the respective parties hereto acting through their respective attorneys that the following is a Statement of Agreed Facts herein,

"1. On June 17, 1942, defendant, Edward Silver, executed his promissory note for the sum of $300.00 payable to the order of plaintiff herein to cover a loan for the principal amount of $300.00. Said loan was secured by a Chattel Mortgage on household goods executed of even date by said defendant. This Chattel Mortgage was not recorded with the Recorder of Deeds of Cook County. Defendant defaulted in payment of his note. On September 22, 1942, judgment was confessed on same in the Municipal Court of the City of Chicago, for the principal sum of $316.40, which included the unpaid principal and accrued interest. No payment was made by the defendant on the above mentioned note. Garnishment proceedings were instituted against defendant's employer on the judgment, and defendant subsequently filed a voluntary petition in bankruptcy in which he scheduled the amount due plaintiff. Plaintiff examined defendant at the Meeting of

[illegible] FINANCE CO[illegible] OF [illegible],
a corporation,
Appellant,

v.

[illegible] SLAV[illegible],
Appellee.

MR. [illegible] JUSTICE [illegible]

This is an appeal by the [illegible] from an order entered March 5, 1918, [illegible] the complaint [illegible] closure of a [illegible] code. [illegible] was in the usual form [illegible] satisfaction of the [illegible] on a written agreement and [illegible] of the circuit court to be [illegible] 24, Chapter 73 of Hurd's Illinois [illegible] The agreement and [illegible] follows:

"It is hereby stipulated and [illegible] between the respective parties hereto [illegible] respective attorneys that the [illegible] ment of agreed facts herein.

"1. On June 17, 1918, defendant [illegible] executed his promissory note [illegible] payable to the order of plaintiff [illegible] loan for the principal amount of [illegible] said loan was secured by a chattel mortgage on [illegible] goods executed of even date by said [illegible] This chattel mortgage was not [illegible] Recorder of Deeds of Cook County. [illegible] defaulted in payment of his note. [illegible] 1922, judgment was entered on [illegible] tial Court of the City of Chicago, for the principal sum of $316.40, which included the said principal and accrued interest. No payment [illegible] made by the defendant on the above mentioned note. Certificate proceedings were instituted against defendant's employer on the judgment, and defendant subsequently filed a voluntary petition in bankruptcy in which he scheduled the amount due plaintiff. Plaintiff examined defendant at the meeting of

Creditors, but did not file objections to discharge in bankruptcy of the defendant. In his bankruptcy schedule, defendant claimed as exempt property, the property which is covered by the Chattel Mortgage herein. Plaintiff did not move for the appointment of receiver in the bankruptcy proceedings. Defendant was subsequently discharged in bankruptcy and subsequently thereto plaintiff filed its complaint to foreclose the Chattel Mortgage herein."

The defendant has not appeared in this court in support of the decree.

As already stated, the Circuit Court had jurisdiction by virtue of the statute, and the chattel mortgage, although unrecorded, was valid between the parties thereto. Martin v. Sexton, 112 Ill. App. 199. Kinder v. King, 180 Ill. App. 62. When the property was claimed as exempt in the bankruptcy proceedings, title thereto remained vested in the bankrpt and the mortgagee continued to have his right in the chattels under the mortgage, notwithstanding any bankruptcy proceedings, and further controversy between the parties was to be determined in the State courts. In Re Cunningham, 15 Fed. (2d) 700; Kobacker Furniture Co., Inc. v. Benjamin Huggins, 290 N. Y. Supp. 172, 160 Misc. 532 (N.Y.); Doyle v. Hall, 86 Ill. App. 163. When default has been made by a mortgagor the mortgagee has several remedies which he can pursue concurrently. In Re, Estate of Folksdorf, 304 Ill. App. 463; Rohrer v. Deatherage, 336 Ill. 450. In bankruptcy a valid lien is not affected by the discharge of the debt it secures, and the lien is enforceable against the property it covers, even after the discharge of the debt which the lien secures. Cole v. Duncan, 58 Ill. 176; Sample v. Beasley, et al., 158 Fed. 607; Pace v. Berry, et al., 176 Ky. 61. The discharge of the bankrupt does not annul the original debt, and the creditor is entitled to apply the proceeds on it. The discharge is analogous to the Statute of Limitations. Mallin v. Wenham, 209 Ill. 252; Local Loan v. Norman, 319 Ill. App. 114 (Abstracted); Robinson v. Exchange

[illegible]

Nat'l Bank, 28 Fed. Supp. 244.

We hold it was error on this stipulation of facts for the trial court to dismiss plaintiff's complaint and that the foreclosure, as prayed for, should have been granted on the facts stipulated. The decree will be reversed and the cause remanded with directions to enter a proper decree of foreclosure on plaintiff's motion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and Niemeyer, JJ., concur.

Nat'l Bank, 28 Fed. Supp. 244.

We hold it was error on this stipulation of facts for the trial court to dismiss plaintiff's complaint and that the foreclosure, as prayed for, should have been granted on the facts stipulated. The decree will be reversed and the cause remanded with directions to enter a proper decree of foreclosure on plaintiff's motion.

Tuv. Sup. Ct. "Decree of dismissal ...

O'Connor and Mierzejewski, Ad., counsel.

43541

HERMAN BUSH,
Appellant,

v.

MOSE BUSH, LOUIS BUSH, BUSH MILL SUPPLY COMPANY, a corporation, THE CELOTEX CORPORATION,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Herman Bush and Mose Bush are brothers. Herman filed a complaint for accounting and other relief against Mose and other defendants since dismissed out of the case. The case as put at issue and referred to a master, who took the evidence, and the cause was heard on exceptions to his report. The exceptions were overruled and a decree entered May 24, 1945, finding the sum of $897.24 due from Mose to Herman and entering judgment on the finding. Herman appeals, claiming the finding should have been for a larger sum.

The material facts appear to be as follows. Mose Bush, in 1937, owned and controlled all the stock of a corporation, the Northern Paper Stock Company. Its business was dealing in old paper and rags. Its office was at 1408 Armitage Avenue in Chicago. The premises were improved with a 3-story brick building built by Mose. In 1934, the legal title to this building was conveyed to Herman. Herman for many years owned a rug cleaning business at 4447 North Kedzie Avenue in Chicago. He had also had experience with the same kind of business carried on by his brother Mose at the other place.

December 21, 1937, the corporation controled by Mose filed a voluntary petition in bankruptcy, and it was so adjudicated. September 21, 1939, Mose personally filed a similiar petition, was adjudicated, and on September 8, 1941, discharged. The assets

of Mose when he filed his petition were not more than $200.00, all claimed as exempt under the statute.

The master finds that from the year 1937 and for two years thereafter, Mose did not have any considerable amount of property, and during the early part of 1938 he was without employment. Herman was then in New York City. While he was away, Mose, without his knowledge or authority, began to operate an independent business from the plant of Herman. He used the telephone and other facilities of that plant. He called the business "Herman Bush Mill Supply Company" and had stationery printed so designating it. It was a brokerage business of jobbing in paper and paper stock. Herman alleges Mose borrowed money for this business on Herman's name and credit. Mose denies he used Herman's name. At any rate, Herman wished his brother to be able to make a living. To that end the brothers discussed the matter of purchasing the assets of the bankrupt corporation formerly owned by Mose. While Herman was in New York, Mose wrote him a letter about this and asked Herman to assist him in connection with the sale of the assets of his old company. It is a worthwhile letter, and we have read it. He informed Herman for the first time that he was using Herman's name in the new business. When Herman returned to Chicago an argument was on. The upshot was that the assets of the bankrupt company were purchased in January, 1938, with Herman's cash and in his name. The bill of sale to Herman is dated January 31, 1938. The business of Herman Bush Mill Supply Company was then established at 1408 Armitage Avenue, where the Northern Paper Stock Company was formerly situated. No written agreement between the brothers was executed. A salary, at first $25.00 per week, after some months $30.00 per week, was paid to Mose. Herman testifies the salary was all Mose was to get. Mose says the purchase of the old assets was made by Herman for him and for his sole benefit.

The master finds, although there was no evidence of a written agreement, that Mose was to have some share of the profits over and above his salary. The evidence is conflicting as to whether Mose neglected the business. Herman says he did. However, there seems to be no doubt that the business made a substantial profit for the year 1940. There came bitter clashes between the brothers, and in the latter part of June, 1940, Herman determined to sever his business relationship with Mose. The master says the steps of the liquidation of the business by the parties are "undisputed". July 1, 1940, Herman issued a check of the Herman Bush Mill Supply Company to Louis Bush, son of Mose, for the sum of $1,000.00. A like check in like amount was issued to Louis Bush, July 5, 1940. In the same month of that year Mose and Louis organized a corporation known as Bush Mill Supply Company. These checks were endorsed by Louis and deposited in the bank account of this new corporation. Herman Bush removed from 1408 Armitage Avenue all the inventory that had been accumulated as a result of the operations there except as hereafter stated. He stored these goods in his own warehouse. He left on the premises other goods of the value of $1,906.89. The Armitage Avenue real estate was then conveyed from Herman to Louis Bush. There was an open account due Herman Bush Mill Supply Company in the sum of $821.35. No personal assignment of this seems to have been made. July 10, a check of the Herman Bush Mill Supply Company was signed by Herman Bush for the sum of $300.00 to the order of Bush Mill Supply Company. This check was deposited in the account of that corporation. July 1, Herman left the Armitage Avenue premises, and the business thereafter was conducted solely by the Bush Mill Supply Company under the direction of Mose and his son.

Some property of the Herman Bush Mill Supply Company remained on the premises. A bill of sale conveying this from Herman to Louis Bush was made out July 1, 1940, but does not seem to have been signed or delivered. On the same date, the master finds, Mose Bush executed and delivered a general release to Herman. Herman produced it before the master. The master finds that on this same July 1, 1940, Herman and Mose agreed on a settlement with each other, Herman to pay the sum of $5,000.00 in cash, equipment and merchandise, to Mose in final settlement of his claim to th assets and profits of the Herman Bush Mill Supply Company. The $2,000.00 paid in checks, that part of the inventory goods permitted to remain on the premises, the open accounts, these are all held to be the property of Mose Bush by virtue of the agreement made between the brothers on that day.

Mose Bush held life insurance policies in the Equitable Life Insurance Association. Beginning with May 11, 1938, Herman, personally and by checks of the Herman Bush Mill Supply Company, issued a series of checks to the amount of $705.47, which were in payment of the permiums on the life insurance policies held by Mose. The checks were delivered to the insurance company and so applied. February 6, 1938, Herman issued his personal check to the New York Life Insurance Company for the sum of $46.77, which was likewise applied. The answer of Mose asserts these were all included in the settlement of July 1, 1944. The master finds there is no evidence to sustain this contention.

January 6, 1938, and February 2, 1938, Herman gave Mose on each occasion a check for $72.50. Each of these were used by Mose to pay rent on the apartment in which he then lived. Mose asserts these checks were on account of profits duevto him

Some property [illegible]
remained on the premises. [illegible]
Bowman to locate [illegible]
seem to have been [illegible]
another file, [illegible]
to Bowman. [illegible]
file a bath [illegible]
on a [illegible]
[illegible]
satisfaction [illegible]
[illegible]
part of the [illegible]
the [illegible]
[illegible]
on that [illegible]

[illegible]
life insurance [illegible]
personally [illegible]
[illegible]
in regard to [illegible]
[illegible]
to [illegible]
to his [illegible]
which was [illegible] file [illegible]
all indexed in [illegible]
finds there is no [illegible]

January 6, 1955, and January [illegible]
on each occasion a check for $2,850. [illegible]
[illegible] to pay rent on the apartment in which he [illegible]
asserts these checks were on account of profits due to [illegible]

from the business. The master, who saw and heard him testify, did not believe so and included the amount of these checks in the total sum found to be personally due from Mose to Herman. These two bring the total sum of money found to have been borrowed by Mose from Herman without repayment to the sum of $897.24, for which the decree gives judgment.

Herman claims that in addition to this he is entitled to judgment against the defendants for $9,185.52 on account of money spent at the special instance and request of Mose for improvements, insurance and trackage charges upon the premises at 1408 Armitage Avenue. It will be remembered these are the premises reconveyed by him to Louis Bush, July 1, 1940. There is proof that he expended this amount for these things while he was in possession of the premises and running the business conducted at that number. It is not proved that the expenditure was made at the special instance and request of Mose Bush. Herman was in charge of the business and under his direction a bookkeeper was hired, who kept the accounts of the business. These books do not indicate that these expenditures were made at the instance and request of Mose.

The same condition exists as to the further claim of plaintiff amounting to $1,073.50, which was expended in connection with litigation and settlement arising out of a loan made between the parties in connection with the bankruptcy proceedings, and the further claim of $4,728.24 for alleged loans consisting of cash, inventory of personal property, merchandise and accounts receivable, for which plaintiff says he is entitled to judgment.

These claims are quite unusual when it is remembered the original complaint was for $2800.00 in cash paid July 1, 5 and 10, 1940, and for merchandise to the amount of $1900.00 to be sold, with accounts to be collected and the proceeds accounted

from the business. The [illegible], who [illegible] did not believe in and included the accounts of these [illegible] the total sum found to be [illegible] from [illegible] These two brings the total [illegible] of money [illegible] borrowed by [illegible] from [illegible] amounts [illegible] $2297.24, for which the [illegible] [illegible]

[illegible] judgment against the [illegible] money spent at [illegible] improvements [illegible] at 1108 [illegible] proceeds recovered [illegible] is proof that he [illegible] be in [illegible] conducted it just [illegible] was made at the [illegible] [illegible] a bookkeeper [illegible] these books do [illegible] at the inquiry [illegible]

The case could [illegible] plaintiff amounting to [illegible] with litigation and [illegible] the position in connection [illegible] further claim of $4,750 [illegible] inventory of personal [illegible] merchandise [illegible] for which plaintiff [illegible] entitled to judgment.

These claims are quite unusual when it is remembered [illegible] original complaint was for $2800.00 in cash paid July 1, [illegible] 10, 1940, and for merchandise to the amount of $1200.00 to be sold, with accounts to be collected and the proceeds accounted

for, equipment delivered as a bailment and said not to have been returned. These additional sums now claimed were set up first by way of amendment to the original complaint. The amendment was filed April 19, 1944. The original complaint was filed February 14, 1944. Both original and amended complaints were verified. It is apparent this suit was filed without any consistent theory on which plaintiff was to recover. The items aggregating $9,794.64 were undoubtedly expended by Herman Bush while he was conducting the business on Armitage Avenue and largely at his own instance rather that at the special instance and request of his brother. The same thing is true of the items aggregating $1,073.50, said to have been expended in connection with litigation, settlement, etc. As to the items aggregating $4,728.24, these seem to consist of two checks heretofore described, delivered to Louis Bush on July 1, 1940, an inventory of merchandise amounting to $1,906.89, and accounts receivable for $829.31 turned over at the same time.

It is the contention of defendants, and the master finds, that these were all delivered as a part of the $5,000.00 settlement made by the plaintiff and defendant July 1, 1940. The master finds this settlement was made. Plaintiff denies it and undertakes to impeach his brother as a witness and prove him to be uncredible.

The evidence in this record is certainly conflicting. There is no evidence tending to show the true value of all the property involved on July 1, 1940, when Herman gave up all contact with the business, and the fact that there is no proof of the value of the property, either real, personal or accounts, make it difficult to determine what is reasonable and just and true in this suit. The master is an important officer of the

for, equipment delivered [illegible] been returned. There [illegible] by way of [illegible] amendment was filed [illegible] or filed [illegible] claims were in [illegible] attempt was [illegible] from a time [illegible] merits and [illegible] [illegible] to the [illegible] two [illegible] duly i [illegible] the same time.

It [illegible] this [illegible] delivered settlement [illegible] the [illegible] it and [illegible] the [illegible].

The evidence [illegible] There is no evidence [illegible] improperly levied on July 1, 1910, [illegible] contact with the business, and the fact that [illegible] of the value of the use only, either real, personal or [illegible] make it difficult to determine such is reasonable [illegible] true in this suit. The matter is an issue of [illegible]

court. Some courts have seemed to think his findings, when approved by the chancellor, have the weight of the verdict of a jury and should not be set aside unless clearly and manifestly against the weight of the evidence Stasch v. Romza, 387 Ill. 67. We have considered the law on this point in another opinion handed down by this court on this day. Irwin, Receiver, v. Schleichert, No. 43444, not yet reported. Whatever the rule may be, some weight must, be given to the findings of a master, who has seen and heard the witnesses, when his findings are approved by the chancellor, and that is the case here. The undisputed facts of the failure of plaintiff to state his claims in his first verified complaint that he obtained, and holds a general release from his brother Mose executed July 1, 1940, that he left the premises and turned over the business at that time with other evidence justifies the findings of the master, as approved by the chancellor, and lead to the conclusion the decree must be affirmed. McKey v. McKean, 384 Ill. 112.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

courts. Some courts have agreed to [illegible] approved by the omission, [illegible] of a jury can [illegible] manifestly violate the right of a [illegible] 387 Ill. 67. [illegible] another [illegible] Reeves, v. Indiana, [illegible] the rule may be, [illegible] of a member, [illegible] findings are approved by the [illegible] news. The indictment [illegible] his claim in the first [illegible] holds a [illegible] 1340, [illegible] at the [illegible] murder, [illegible] conclusion [illegible] 364 Ill. 17.

O'Connor and [illegible], [illegible].

43562

L. H. BARKHAUSEN and RANDOLPH BOHRER,
trading as The Doubleby Co.,
Appellees,

v.

WILGUS NAUGHER (Impleaded)
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

September 29, 1944, plaintiffs caused a judgment by confession to be entered against defendant for rent alleged to be due on a store lease. The judgment was for the sum of $3,813.42. The lease was for a term beginning March 1, 1940, and ending April 30, 1945. The lessors were the trustees of the Estate of Marshall Field, the lessees, J. Wilgus Naugher and Beryl Jacobson. Agnes F. Laury was a guarantor of the lease, a copy of which was attached to the complaint. The premises were known as 2342 East 71st Street, Chicago. The rent was payable in advance on the first day of every calendar month. The premises were to be used as "a Package Liquor Store".

October 27, 1944, Naugher filed a petition praying the judgment might be set aside and on January 17, 1945, an amended petition with a like prayer. Defendant averred in substance that the judgment was taken without his knowledge or consent, was procured by fraud on a claim to which he had a complete defense in that the lease had been cancelled by agreement of the parties prior to the accrual of the rents claimed for, and the premises had been long since surrendered to the lessors in exchange for a release of the lessees under the lease; that plaintiffs were strangers to the lease and showed no right to begin their action; that the attorney who represented defendants, Samuel S. Siegel, possessed no authority

to act in their behalf or to waive process, etc.; further, that the premises in question were rented after the surrender of possession and the claim against defendant was an attempt to collect double rent.

On February 21, 1945, thereafter, an order was entered by the court giving defendant leave to appear and defend; that a trial of the cause be had, the judgment to stand as security and the petition to stand as an affidavit of defense. Execution was stayed.

April 20, 1945, the plaintiff made a motion for summary judgment. It was supported by the affidavit of Henry Darre, who at the times in question was the real estate agent for the Field Estate and its agent during the period of time set forth in the amended petition and prior thereto. Mr. Darre stated that he had read the amended petition of defendant. He denied defendant or anyone for him had notified him or any agent of the Field Estate that he had been operating at a loss or that he or any agent of the Field Estate advised petitioner that the Estate had a prospective tenant to rent the store; further, that he or any other agent of said estate stated to defendant that if he would move out his fixtures and surrender possession to the lessors by October 10, 1942, the lessors would release defendant from his liability for the payment of rent after October 31, 1942. In fact, he denied that any conversations of that kind were held or agreements of any kind made at any time or discussed with defendants or either of them by him or any other agent of the Marshall Field Estate, by which affiant or any other agent agreed with the defendant that the lessors would release defendant of and from any rent accruing under the terms of the lease on and after November 1, 1942. The affidavit also denied that in the early part of October, 1942, defendant

to act in their behalf or to [illegible] that the [illegible] in [illegible] of [illegible] so collect [illegible].

[illegible] by the [illegible] a total of [illegible] and the condition [illegible] are subject.

[illegible] judgment. [illegible] to [illegible] in [illegible] field [illegible] and the [illegible] in the [illegible] that he [illegible] information or [illegible] the field [illegible] or any [illegible] the [illegible] that he [illegible] that up to [illegible] to the [illegible] defendant [illegible] October 21, 1942. [illegible] that had [illegible] or discussed with defendant or with [illegible] other agent of the General Field [illegible] or any other agent agreed with the [illegible] would release defendant of and from any [illegible] terms of the lease on and after November 1, 1942. The affidavit also denied that in the early part of October, 1942, defendant

vacated the store and surrendered possession of the premises to the lessors and handed over a copy of the lease for cancellation. He stated the fact to be defendant vacated the store on or about November 1, 1942, and failed and refused to pay any rent in accordance with the terms of the lease since August, 1942; that there was due a balance of $315.46 for the month of August, 1942; that the trustees of the Field Estate confessed judgment on the lease in the Municipal Court for $1, 147.96 for rent for the months of August, September and October, 1942; that Agnes F. Laury, the guarantor on the lease, deceased after executing it; that the trustees of the Field Estate filed their claim for rent in her estate in the Probate Court of Cook County for rent accruing on and after November 1, 1942, and including November 30, 1943; that these premises were sold by the Field Estate to plaintiffs in this cause and that plaintiffs under the provisions of the sale and the assignment of rents thereon became entitled to all rents under said lease from and after December 1, 1943; that neither affiant nor any other agent of said estate had any authority to enter into any agreement to modify, waive or amend any of the conditions of the lease by reason of Clause 19 thereof, which the affidavit quotes verbatim. The affidavit of Mr. Darre further says the judgment was fully paid and satisfied on August 22, 1944; that the trustees of the Field Estate were paid $3,000.00 out of the Estate of Agnes F. Laury, and that no claim or defense of any kind or nature whatsoever to the payment of said judgment or payment made by the estate has ever been asserted by any of the defendants.

In support of the motion plaintiff also submitted the

vacated the store and surrendered possession [illegible]
to the lessors and handed over [illegible]
cancellation. He stated the fact to be [illegible]
the store on or about November 1, 1947, [illegible]
refused to pay any rent in accordance [illegible]
lease since August, 1948; that there [illegible]
$31,40 for one month of August, 1948; that [illegible]
the field deputy contrary [illegible]
municipal court for [illegible]
August, September and October, 1948; [illegible]
guarantor on the lease, [illegible]
the trustees of the Field estate [illegible]
in her estate in the Probate Court [illegible]
accounting on and after November 1, [illegible]
30, 1948; that there [illegible]
to plaintiffs in [illegible]
provisions of the [illegible]
became entitled to [illegible]
December 1, 1948; [illegible]
of said estate and any authority [illegible]
to modify, waive or extend any of the conditions [illegible]
by reason of clause 14 thereof, [illegible]
verbatim. The affidavit of [illegible]
was fully paid and satisfied on August [illegible]
trustees of the Field Estate were paid [illegible]
Estate of Agnes F. Lauzy, and that no claim or demand of [illegible]
kind or nature whatsoever to the payment of said judgment
or payment made by the estate has ever been asserted by [illegible]
the defendants.

In support of the motion plaintiff also submitted the

affidavit of Thomas D. Devere, who says he is an employee of the agents managing the property; that since defendants vacated the store premises plaintiffs rented the rear portion of the store to Toby Frocks for the period from January 1, 1944, to July 31, 1944, and received $25.00 per month rental; that therefore the defendants are entitled to a credit amounting to $192.50, which credit is comprised as follows: Seven months at $25,00 per month or $175.00, and attorneys' fees thereon amounting to $17.50, making a total of $192.50.

Plaintiffs also filed an amendment to the affidavit of Mr. Darre. He says he is the person who theretofore executed an affidavit in support of plaintiffs' motion; that the premises described in the lease remained vacant after defendant vacated said premises on November 1, 1942, for all of the period of time since that date to and including the period for which judgment by confession be entered; that the premises were not re-rented to any other person except that rear portion of the premises which was rented to Toby Frocks, as set forth in the affidavit concerning said Toby Frocks, also filed in support of the motion for summary judgment.

A verified answer in opposition to plaintiffs' motion was filed by defendant Naugher on May 21, 1945. This answer was stricken and no other was filed in its place and on June 8, 1945 summary judgment was entered for $3,813.12.

The proceeding was under the Illinois Revised Statutes, Chap. 110, par. 259.~~26~~15, and Supreme Court Rule ~~26~~ 22, directing the practice thereunder. The affidavits submitted in support of the motion in our opinion conform to the statute and the rule. The affidavit of defendant was mere conclusions, not facts to which the affiant could have testified in court, as required by the rule, and was therefore properly stricken.

The errors argued by defendant seem to be purely technical.

affidavit of Thomas D. Devere, who says he is an employee of the agents managing the property; that since taking over the store premises plaintiffs vacated the [illegible] portion of the store to July 31, 1944, and received $2,000 rent monthly; that therefore the defendants are entitled to [illegible] to $122.50, which credit is computed [illegible] months at $45.00 per month [illegible] thereon amounting to $17.50, [illegible]

Plaintiffs also filed [illegible] Mr. Devere. He says he is the person [illegible] an affidavit in support of [illegible] described in the lease [illegible] said premises on November 1, [illegible] time since that date to [illegible] judgment by confession [illegible] re-rented to any other person [illegible] premises which [illegible] affidavit concerning [illegible] of the motion for [illegible]

A verified answer in [illegible] was filed by defendant lawyer on [illegible] was stricken and no other was filed in [illegible] 1945 summary judgment was entered for [illegible]

The proceeding was under the Illinois revised Statutes, Chap. 110, par. 259.56, and Supreme Court Rule 56. Discussing the practice thereunder, The affidavits submitted in support of the motion in our opinion conform to the statute and the rule. The affidavit of defendant was more conclusory, not facts to which the affiant could have testified in court, as required by the rule, and was therefore properly stricken. The errors argued by defendant seem to be purely technical.

It is contended in the first place that plaintiffs were strangers to the lease and that under Section 36 of the Practice Act no judgment should have been rendered in their favor. A number of cases are cited which are not relevant under the facts which here appear. The affidavit of Mr. Darre discloses that the grantees of the real estate in question are the actual bona fide owners of the lease and the rents therein reserved and, therefore, had full right to confess judgment on the lease. (See Ill. Rev. Stat., 1943, Chap. 80, par. 14; also Chap. 110, par. 146, of the same statutes, Civil Practice Act, §22.) The precise question seems to have been decided in Glass v. Maresh, 299 Ill. App. 612 (abstracted) and fully sustained by Schroeder v. Electric Apparatus Co., 270 Ill. App. 238, there cited.

Defendant contends in the second place that the attorney who confessed judgment was without authority and that the judgment is therefore void because of lack of authority to appoint a second attorney. Clause 17 of the lease is broad enough to cover the authority of Mr. Siegel and also of Mr. Callias, although we grant that such powers are strictly construed.

Defendant seems to wholly overlook the fact that the purpose of the proceeding for summary judgment is not trial but an inquisition to determine whether there is a material issue of fact between the parties to be tried. The whole subject is discussed in Gliwa v. Washington Ass'n., 310 Ill. App. 465. Other decisions of this and the Supreme Court are to the same effect. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523; Guild v. Metropolitan Life Ins. Co., 303 Ill. App. 509; May v. Chas. O. Larson Co., 304 Ill. App. 137. The

It is contended in the first place that plaintiff was [illegible] to the lease and that under section [illegible] of the same lease no judgment should have been rendered in favor [illegible] of essence are often [illegible] which were absent. In [illegible] the premises of the [illegible] Bona fide owners of the lease [illegible] and, therefore, [illegible] lease. (See [illegible] Chap. 110, [illegible] Act, 1929.) [illegible] in Ficus v. [illegible], [illegible] fully [illegible] of [illegible] 111. App. 489, [illegible].

Defendant contends [illegible] who [illegible] judgment in therefor [illegible] constitute a [illegible] enough to [illegible] Dallas, [illegible] considered.

Defendant [illegible] succession of the successive [illegible] such an inquisition to determine whether there is a [illegible] issue of fact between the parties to [illegible] subject is discussed in Ficus v. [illegible], 210 Ill. App. 465. Other decisions of this [illegible] to the same effect: Diversey Liquidating Corp. v. Washington, 270 Ill. 322; Build v. Metropol Gas Light Co., 204 Ill. App. 309; May v. Chas. O. Larson Co., 204 Ill. App. 127. The

inquisition here discloses that there is no material issue of fact under the pleadings and the judgment of the trial court will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

inquisition here disclosed that there is no material issue of fact under the pleadings and the judgment of the trial court will be affirmed.

O'Connor and Mansfield, JJ., concur.

43433

MABEL ORR,
Appellee and Cross-Appellant,

v.

SIDNEY HERZOG and JOHN F. ROCHE,
Cross-Appellees,
and HAROLD SCHENCKER,
Appellant.

On Appeal of HAROLD SCHENCKER,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Schencker appeals from a judgment of $1,000 entered against him on the verdict of a jury in an action for personal injuries arising out of an accident in which the automobile of Schencker, the automobile of plaintiff's brother and the automobiles of defendants Herzog and Roche were involved. Plaintiff by cross-appeal seeks to reverse the judgments in favor of the defendants Herzog and Roche entered on verdicts finding each of them not guilty.

Schencker's sole contention is that the court should have directed a verdict in his favor or entered judgment for him notwithstanding the verdict. Schencker's motion for a directed verdict at the close of plaintiff's evidence was denied. He gave no indication of an intent to stand upon his motion. He offered no evidence in his own behalf and did not cross-examine any of the witnesses appearing on behalf of his co-defendants, but at the close of all the evidence his counsel announced that he rested, and presented a motion reciting that "At the close of all the evidence for both plaintiff and defendants" he moved the court to withdraw "all the evidence from the jury" and to instruct the jury to find him not guilty. This motion being denied, he tendered and the court gave a number of instructions directing the jury to

consider all the evidence in the case. [illegible]
or abandoned his action made at the close of [illegible]
evidence, and his contention must take [illegible]
the evidence offered on behalf of plaintiff [illegible]
Pidcock v. Blackfoot [illegible] 87 [illegible]
v. Gilmore & Pyle Co., [illegible]

The out [illegible] in [illegible]
court lot. [illegible]
1-65, in the [illegible] northbound [illegible]
Lincoln [illegible] when [illegible]
around a [illegible] enough car, [illegible]
or more [illegible] the [illegible]
was involved in a collision with [illegible]
damage to the truck [illegible]
the course of [illegible]
minutes 12 or six to [illegible] - [illegible]
and the rear half-lift [illegible]
in the lower lane along [illegible]
and southbound [illegible]
several hours later [illegible]
lifting the bed [illegible]

Johnsonter was driving his car in the [illegible]
west at about 40 or 45 miles an hour; his truck was on the
left shoulder down; in attempting to [illegible] car in [illegible] to be
turned to the left into the [illegible] lane about 20 [illegible]
of the Orr car, which was [illegible] about 10 [illegible]
Johnsonter did not see the [illegible] car until about 10 feet
from it, and attempted to immediately applied his brakes, [illegible]
into the rear of the Herzog car and came to a dead stop. Orr, who
had followed the Johnsonter car 15 or 25 feet before its collision
with the Herzog car, immediately applied his brakes, coming to
practically a dead stop - that is, moving not more than one-half

mile an hour - when his car was crashed into from the rear by Roche, who had been driving about 30 feet behind the Orr car for several blocks and at the same speed. This collision threw the Orr car against the Schencker car.

Schencker testified that as he turned into the inner lane he could not see the right of the Herzog car because of the cars in front of him; that there was no light on the left of the Herzog car; that after his collision he noticed that the right tail-light of the Herzog car was lighted, but it had no light on the left side. Herzog and a police officer testified that after the Schencker car had collided with the Herzog car the right tail-light was lighted, but on the left side the tail-light had been broken off.

Schencker's motions for a directed verdict and for judgment notwithstanding the verdict are based on his contention that there is no evidence, construed most favorably in behalf of plaintiff, from which the exercise of due care by the plaintiff or negligence of Schencker can be reasonably inferred. Plaintiff admits that she was notwatching the traffic closely, but there is evidence tending to support the argument that her brother, driving the car in which she was riding, was fully aware of the conditions confronting him; that he saw Schencker turn from the second to the inner lane and watched his movements thereafter so effectively as to be able to stop without colliding with Schencker's car after its collision with the Herzog car, and that no warning by plaintiff would have given her brother greater knowledge of the circumstances than he already had. The question of plaintiff's contributory negligence or want of due care was therefore a question for the jury. Hagen v. Bailus, 283 Ill. App. 249. Defendant Schencker strongly relies upon the case of Jirkovsky v. Elfman, 323 Ill. App. 282 (abst.), where the reviewing court held the plaintiff, who was riding a motorcycle, guilty of con-

mile an hour - when his car [illegible] Hoobs, who had been driving about [illegible] car for several blocks and at [illegible] threw the car [illegible]

Schenckor testified [illegible] he could not [illegible] in front of him; that [illegible] Hoobs car; that when he [illegible] tail-light of the [illegible] on the left side. [illegible] police [illegible] after the accident [illegible] right tail-light was [illegible] had been broken [illegible]

Schenckor [illegible] notwithstanding the [illegible] is no evidence, [illegible] from which the [illegible] of Schenckor [illegible] are not [illegible] tending to [illegible] in which [illegible] frontage; that he [illegible] inner lane and [illegible] as to be able to [illegible] the collision with the [illegible] tiff would have [illegible] circumstances than he already had. [illegible] contributory negligence or fault of [illegible] question for the jury. Hagen v. Rolling, 203 Ill. App. 44. Defendant Schenckor strongly relies upon the [illegible] of Lincoln v. Gifford, 323 Ill. App. 282 (abst.), where the trial court held the plaintiff, who was riding a motorcycle, guilty of con-

tributory negligence as a matter of law in following an automobile so closely that he was unable to stop without colliding with the automobile when the latter suddenly stopped. The facts presented in that case are not controlling in the one before us. Here the traffic was moving in a steady stream in the several lanes of the northbound section; Schencker turned from the lane in which he was driving, going in front of the Orr car, and as stated by counsel for Schencker in his brief, "Orr traveled at a distance of about twenty or twenty-five feet behind the Schencker car while the Schencker car was traveling ahead for that distance previous to the accident." At the admitted speed of 30 miles per hour the Orr car was behind the Schencker car less than a second before the accident. If reasonable minds might differ as to whether Orr could or should have acted other than he did within the short time given him for decision, his negligence and that of the plaintiff are questions of fact rather than of law. Trzaska v. Bigane, 325 Ill. App. 528, 534. The same conclusion must be reached in respect to Schencker's negligence. He was traveling safely in the second lane; he turned into the inner lane in an effort to overtake and pass cars ahead of him; there is evidence that both of the rear lights of the Herzog car were lighted; if so, Schencker could have seen the lights before getting all of the way into the inner lane, and the question of negligence in making the change into the inner lane becomes a question of fact; if he was negligent in this respect and thereby forced Orr to a sudden stop, his negligence, with that of Roche, if any, was a concurring or proximate cause of plaintiff's injuries.

In view of the position taken by plaintiff on oral argument, it is unnecessary to consider her cross-appeal.

The judgments of the trial court as to each of the defendants are affirmed.

JUDGMENTS AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

[illegible] tributory negligence as a [illegible]
bile so closely that he was [illegible]
the automobile when the [illegible]
sented in that case are not [illegible]
here the traffic is [illegible]
lanes of the roadway [illegible]
in which he was driving [illegible]
stated by counsel for [illegible]
a distance of about [illegible] feet
car while the driver [illegible]
previous to the [illegible]
ran down the [illegible] man
second before the [illegible]
is to [illegible]
within the [illegible]
that of the [illegible]
Trahin v. Jones, [illegible]
must be treated in [illegible]
travelling safely in [illegible]
in an effort to [illegible]
verse that both [illegible]
if so, whether [illegible]
the way into the [illegible]
making the change into [illegible] fact;
if he was negligent in this [illegible] a
sudden stop, his negligence, [illegible]
concurring or proximate [illegible] a jury.

In view of the point on taken by [illegible]
it is unnecessary to consider her [illegible].

The judgments of the trial court in so much of the defendants are affirmed.

JUDGMENT IS A[illegible]

Matchett, P. J., and O'Connor, J., concur.

43456

321 I.A. 556

RALPH BRIGGS,
Appellee,

v.

THE CATHOLIC BISHOP OF CHICAGO,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of $5,000 in an action for injuries sustained by the plaintiff who fell while attempting to pass over an ice covered public sidewalk adjacent to the school yard of defendant.

The ice on the sidewalk covered the entire width of the sidewalk for about 30 feet. It was caused by the freezing of surface water and snow carried by three cement grooves or drains connected by pipe from the yard of the defendant over the public sidewalk into the street. Defendant does not question its liability if plaintiff was free from contributory negligence. However, it contends that such negligence on the part of the plaintiff was established as a matter of law and that the court should have directed a verdict in its behalf.

The accident occurred about 8:30 in the morning on a clear and sunny day; the temperature was cold and freezing; there was no snow or ice on the sidewalk except the patch on which plaintiff fell, and a similar patch extending along the sidewalk 12 or 15 feet; there was no snow covering the ice, and it was slippery. On the morning of the accident plaintiff walked toward the street intersection to the south, passed safely over the first patch of ice and started across the second or larger patch, which was worse than the first one; when he got about half way across he endeavored to get close to the fence so he could get

[illegible]

[illegible] DIVISION,

Appellee,

v.

The [illegible]
a corporation,

Appellant.

[illegible]

[illegible] appeals [illegible]
for injuries [illegible]
to wade over on the [illegible]
yard of defendant.

The [illegible]
sidewalk [illegible]
surface water [illegible]
connected by a [illegible]
sidewalk into the street.
liability if [illegible]
However, it contends [illegible]
plaintiff was a [illegible]
enough [illegible] to discover [illegible].

The evidence [illegible] about [illegible]
clear and sunny day; [illegible]
was no rain or ice on the [illegible]
plaintiff fell, and a [illegible]
12 or 15 feet; there was no [illegible]
slippery. On the morning of the [illegible] plaintiff [illegible]
the street intersection to the [illegible]
first patch of ice and stumbled across the [illegible]
which was worse than the first one; then he got [illegible]
across he endeavored to get close to the fence so [illegible]

hold of it, and was trying to be as cautious as anyone could under the circumstances; he kind of shuffled along and thought he could make it across the second patch of ice; he went ahead and fell.

In answer to a question by defendant's attorney - "At least you took a chance, did you?"- he answered, "Yes." Defendant contends that there was an obvious or known hazard or danger, the risk of crossing which the plaintiff deliberately undertook or assumed when he could have easily turned to his left and walked out onto the pavement of the street where it was free of ice and snow. In a long line of decisions our courts have held that it is not contributory negligence, as a matter of law, for a person to use a sidewalk known to him to be defective, providing he uses such care as the particular conditions require. City of Sandwich v. Dolan, 141 Ill. 430, 435; City of Aurora v. Hillman, 90 Ill. 61, 64; City of Flora v. Naney, 136 Ill. 45, 47; Village of Clayton v. Brooks, 150 Ill. 97, 107; Village of Cullom v. Justice, 161 Ill. 372, 375; City of Streator v. Chrisman, 182 Ill. 215; City of Mattoon v. Faller, 217 Ill. 273, 281; Wallace v. City of Farmington, 231 Ill. 232, 235. In Hubbard v. City of Wood River, 244 Ill. App. 414, where plaintiff was attempting to pass over smooth ice formed over a city sidewalk from a leaking water pipe, the court said (p.419): "We are not prepared to say that it was the duty of appellee to leave the sidewalk and go out into the street in order to avoid the ice. It was his duty, however, to exercise reasonable care and caution for his own safety while attempting to cross the ice. It has been held that mere knowledge of the icy condition of a sidewalk is not sufficient, as a matter of law, to charge a pedestrian with contributory negligence in passing over it, but that is a question of fact for the jury." We see no reason to depart from the ruling announced

in these cases. Plaintiff's contributory negligence, if any, was a question of fact to be determined by the jury.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

43501

CITY OF CHICAGO, a Municipal Corporation,
Appellee,

v.

FRED WALCHER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment finding him guilty of disturbing the peace, in violation of an ordinance of the City of Chicago, and assessing against him a fine of $100 and costs.

As said in City of Chicago v. Williams, 254 Ill. 360, 363: "A suit by a city or village to recover a penalty for the violation of an ordinance is a civil suit and the rules applicable to criminal procedure have no application thereto. (City of Chicago v. Knobel, 232 Ill. 112, and cases there cited.)" Some of defendant's objections, such as the alleged failure to arraign the defendant, are based upon an erroneous conception of the proceeding being governed by criminal procedure, and need not be further considered.

The complaint charges, on information and belief, that the defendant "on the 9th day of March 1945 at the City of Chicago did then and there violate the Revised Code of 1939, as amended, to-wit: Did make or aid in making an improper noise, riot, disturbance, breach of peace, or diversion tending to a breach of the peace, within the limits of the city. In Violation of Chapter 193; Section 1, Sub-Sec. 1 of the Revised Code of 1939 as amended." By order of March 15, 1945, leave to file the complaint instanter was granted and, it appearing that "the defendant was arrested without warrant, capias or other writ

45501

CITY OF CHICAGO, a Mun. Corp.,
Appellee,

v.

PEDRO ALCOR,
Appellant.

Mr. Justice [illegible]

Defendant appeals from [illegible] ity of disturbing the peace, [illegible] City of Chicago, and also [illegible] costs.

[illegible] said in City of Chicago [illegible] 365: "A suit by a city [illegible] the violation of an ordinance [illegible] applicable to criminal procedure [illegible] (City of Chicago v. [illegible]) [illegible] cited.)" [illegible] of defendant [illegible] failure to arraign the defendant [illegible] conception of the proceeding [illegible] cedure, and need not be further [illegible].

The complaint charges, [illegible] the defendant "on the 6th day of April [illegible] did then and there violate the revised Code of 1959, [illegible] to-wit: Did make or aid in making an improper noise, riot, disturbance, breach of peace, or diversion tending to [illegible] of the peace, within the limits of the city. In violation of Chapter 193; Section 1, Sub-Sec. 1 of the revised code [illegible] as amended." By order of March 13, 1963, leave to file the complaint instanter was granted and, it appearing that "the defendant was arrested without warrant, capias or other writ

and is now here present in open court," the court took jurisdiction of the person of the defendant and ordered the bailiff of the court to forthwith take him into custody, and defendant having failed to give bail, fixed at $200 cash bail and $500 if a real estate bond was tendered, he was committed to the common jail of Cook county and the cause set for March 29, 1945. Order of that date shows that the defendant, "being duly advised by the court as to his right to a trial by jury in this cause, elects to waive a trial by jury"; the cause is, by agreement in open court between the parties, submitted to the court for trial without a jury, and the court, having heard the evidence and the arguments of counsel and being fully advised in the premises, "finds the defendant guilty of a violation of the ordinance described in the complaint herein, and assesses a fine against said defendant in the sum of $100," and enters judgment against the defendant for said sum and costs of suit, taxed at $10. No transcript of proceedings in the cause prior to April 12, 1945, when defendant's motion to vacate the judgment was argued, appears in the record. A properly signed and certified report of proceedings of April 12th shows that defendant then moved to correct the record in the case and expunge therefrom that part of the order of March 29, 1945 showing that defendant waived a jury trial and that a trial by the court was had, and in support thereof affidavits of defendant and his counsel were filed. These affidavits purported to show what had actually transpired in the case on and before March 29, 1945, and contradict the record. In the course of the argument on defendant's motion the court stated, "Let the clerk correct the record to show on March 15, 1945 the trial was commenced. The defendant was arraigned and waived a jury trial," and the following order was entered: "The court orders record to read defendant waives jury trial as of March

and is now here present in open court,
diction of the person of the
of the court to [illegible]
having failed to give bail, [illegible]
if a real estate bond was [illegible]
common jail of Cook County [illegible]
order of the trial judge [illegible]
evidenced by the court as [illegible]
cause, which is where [illegible]
work in open court [illegible]
for trial without [illegible]
demand and the [illegible]
proceed, "since the [illegible]
since contained in the [illegible]
against said defendant in [illegible]
against the defendant [illegible]
210. No transcript of proceedings [illegible]
IV, 1948, upon defendant's [illegible]
appears in the record. A [illegible]
of proceedings of a [illegible] court [illegible]
correct the record in [illegible]
of the order of March [illegible]
jury trial and that a trial [illegible]
thereof affidavits of defendant [illegible]
affidavits purported to show [illegible]
case on and before March [illegible]
the course of the argument [illegible]
"Let the clerk correct the record to show [illegible]
the trial was commenced. The defendant was arraigned [illegible]
a jury trial," and the following order was entered: "The [illegible]
orders record to read defendant waives jury trial as of [illegible]

15, 1945."

On the motion to vacate, defendant's argument was directed solely to the insufficiency of the complaint in that it failed to designate the municipality within the jurisdiction of the Municipal Court of Chicago the ordinance of which was alleged to be violated by the defendant. On appeal it is contended that the court was without jurisdiction to enter the judgment for want of jurisdiction of the subject matter and of the defendant. As to want of jurisdiction of the subject matter, the point made in the trial court on the motion to vacate is urged here. The complaint could have been drawn with greater particularity. However, we think it sufficient. The proceeding was brought by the City of Chicago and is entitled City of Chicago v. Fred Walcher; it charges the offense as having been committed at the City of Chicago, where the defendant violated the Revised Code of 1939; no motion to strike the complaint or to make it more specific was made at any time, and whatever objection might have been made to its sufficiency is waived. City of Chicago v. Williams, 254 Ill. 360; City of Chicago v. Lesser, 196 Ill. App. 37.

Objection to jurisdiction of the defendant was not raised in the trial court. The grounds relied upon are that no warrant was issued for his arrest; that the complaint was filed on March 15, 1945, reciting the commission of an offense on March 9; that the order of the court shows defendant was arrested without warrant, capias or other writ and was present in open court on presentation of the warrant, and that the court thereupon took jurisdiction of the person of the defendant. He now contends that the only authority of the police officer to arrest without a warrant was at the time of the alleged commission of the offense, when the officer was required to immediately bring the defendant into court and file a complaint

charging a violation of the ordinance; that any arrest after that time would be illegal, and the detention of the defendant for 6 days before the filing of the complaint would likewise be illegal and deprive the court of jurisdiction. We are not now dealing with a proceeding of Habeas corpus for the release of defendant, or an action for unlawful arrest. By not objecting in the trial court, the objection, if valid, is waived. Mineral Point R. R. Co. v. Keep, 22 Ill. 9; People v. Klein, 292 Ill. 420; People v. Gallier, 243 Ill. App. 348.

The record affirmatively shows that defendant waived a trial by jury, and although present counsel for defendant appeared for him in the trial court on March 29th when judgment was entered, no objection was made to proceeding before the court without a jury, and it was not contended until April 12th, two weeks later, that defendant had not waived a jury.

It is further argued by defendant that he did not receive a fair trial. There is no stenographic transcript or report of proceedings purporting to give the evidence or show what transpired before the court on March 15th, when the proceedings were instituted, or on March 29th when they were concluded, except the brief report, not signed by the trial judge or certified as being complete as to the proceedings of March 29th, whereby it appears that in response to a question by the court the police officer said he had nothing further to offer; that defendant's counsel thereupon requested the privilege of cross-examining the officer, which was denied; the finding of guilty and assessment of the penalty, followed by argument of counsel; a second finding of guilty and assessment of the penalty, and defendant's motion to vacate the judgment, which was continued to a later date. If defendant had been unfairly tried and was found guilty upon insufficient evidence, defendant should have presented a record from

which the validity of the contention could be determined. In the absence of such record we must presume that the defendant was fairly tried and that the evidence before the court supports the finding.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

43511



| | |
|---|---|
| JOSEPH M. WOOD, Plaintiff (Counter-Defendant), Appellee, | |
| v. | APPEAL FROM SUPERIOR COURT COOK COUNTY. |
| JESSIE J. WOOD, Defendant (Counter-Plaintiff), Appellant. | |

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant and counter-plaintiff appeals from a decree granting her a divorce from plaintiff and counter-defendant on her amended counterclaim for separate maintenance.

Plaintiff filed a complaint for divorce charging habitual drunkenness; the defendant answered denying the charge, and with her answer filed a counter-complaint for divorce charging plaintiff with habitual drunkenness and adultery; later, upon leave of court she filed an amended counter-complaint making substantially identical charges of drunkenness and adultery but asking for a decree for separate maintenance, and for such other and further relief in the premises as equity may require. Plaintiff dismissed his complaint for divorce; a hearing was had before the court, and a decree, presented by plaintiff's counsel, was entered. This decree recites the withdrawal and dismissal of plaintiff's complaint for divorce, the filing by defendant of her "cross-complaint for separate maintenance, alleging adultery," and the hearing of "the testimony of witnesses taken in open court in support of said counter-plaintiff's complaint"; finds that the counter-defendant had committed adultery as alleged in counter-plaintiff's complaint and that counter-plaintiff is entitled to a divorce, and accordingly orders, adjudges and decrees "that the bonds of matrimony hereto-

JOSEPH M. WOOD,
Plaintiff (Counter-defendant),
Appellee,

v.

JESSIE G. WOOD,
Defendant (Counter-plaintiff),
Appellant.

Mr. Justice [illegible] delivered the opinion of the court:

Petition and counter-[illegible] granting now a divorce to a [illegible] for awarded court [illegible]

Plaintiff [illegible] for [illegible] drunkenness; his [illegible] her answer filed a [illegible] for divorce [illegible] plaintiff with habitual [illegible] leave of court she filed [illegible] substantially identical [illegible] but asking for a decree for [illegible] other and further relief in [illegible] Plaintiff dismissed his [illegible] had before the court, and a decree, [illegible] counsel, was entered. This decree [illegible] dismissal of plaintiff's complaint forthwith, the filing [illegible] defendant of her "cross-bill for [illegible] alleging adultery," and the hearing of [illegible] witnesses taken in open court in [illegible] tiff's complaint"; finds that the counter-defendant had committed adultery as alleged in counter-plaintiff's complaint and that counter-plaintiff is entitled to a divorce, and accordingly orders, adjudges and decrees "that the bonds of matrimony hereto-

fore existing between the plaintiff and counter-defendant, Joseph Wood, and the defendant and counter-plaintiff, Jessie Wood, be and the same is hereby dissolved, and the same are dissolved accordingly." Within five days the counter-plaintiff served notice of appeal asking that the decree of divorce "be reversed, with directions to the Superior court to enter the decree for separate maintenance for which she prayed in her amended counter-complaint." Plaintiff and counter-defendant has not appeared in this court to sustain the decree.

As said in First Trust Joint Stock Land Bank v. Cutler, 293 Ill. App. 354, 363: "It is a settled rule that a decree must conform to the allegations in the pleadings as well as to the proof in the cause and the prayer of the bill, and relief must be granted on the theory of the complaint, or not at all." It is error to grant relief not prayed for. Kohler v. Kohler, 326 Ill. App. 105. The amended counter-complaint on which hearing was had was framed in accordance with the statute regulating separate maintenance, and a decree of separate maintenance, not divorce, was prayed for. A separate maintenance proceeding and a divorce proceeding, as well as the relief granted in each proceeding, are essentially different. McAdams v. McAdams, 267 Ill. App. 124, 131-132; Petta v. Petta, 321 Ill. App. 512, 520. It was for the counter-plaintiff to determine what relief she desired.

The decree is reversed and the cause remanded with directions to the trial court to consider counter-plaintiff's rights to separate maintenance.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

fore existing between the plaintiff [illegible] 1-40 [illegible],
Joseph Dodd, and the defendant Inc [illegible] 1-[illegible]
Wood, be and the same is hereby [illegible]
dissolved accordingly." [illegible]
served notice of appeal asking [illegible]
"be reversed, with directions to [illegible]
the decree for repair [illegible]
k" amounted [illegible]
has not appeared in [illegible]

[illegible] in [illegible]
[illegible] 2d 111, [illegible] 1964, [illegible]
must conform to the [illegible]
to the point in the [illegible]
relief must be [illegible]
at all." It is error to [illegible]
[illegible], 128 N.E. 100, [illegible]
which [illegible]
regulating [illegible]
maintenance, [illegible]
ance [illegible]
practice in such [illegible]
v. [illegible], [illegible] 111, [illegible]
111, [illegible] 516, [illegible]
mine what relief [illegible]

The decree is reversed [illegible]
direction to the trial court to [illegible]
rights to separate maintenance.

DAVID G. [illegible]
DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

43535

327 I.A. 557

ELIZABETH MARGARET LEWIS,
Appellee,

v.

SOPHIE J. BLUMENTHAL, et al.,

---

PAUL A. F. WARNHOLTZ,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 6, 1942, Elizabeth Margaret Lewis filed her complaint in chancery against Sophie J. Blumenthal and Henry L. Burman, as master in chancery of the Superior court of Cook county, to cancel the master's certificate of redemption issued in a foreclosure suit, and for other relief. After the pleadings were settled, the cause was referred to Master Korshak, where it is still pending.

March 16, 1944, Warnholtz filed his petition praying that he be made a party plaintiff. An order was entered accordingly. Mrs. Lewis answered the petition and afterward that issue was referred to Master Mannion who took the evidence, made up his report, recommended that Warnholtz's petition be dismissed and the cause proceed before Master Korshak. A decree was entered in accordance with the master's recommendations and Warnholtz appeals.

The record discloses that Mr. Warnholtz is a lawyer practicing in Chicago since 1911; that Mrs. Lewis's husband, Milo Franklin Lewis, is a lawyer, but at the time in question was not in active practice. That on September 17, 1940, improved real estate located at 5463-81 Dorchesteravenue, Chicago, was sold at foreclosure sale by Master Burman; that Warnholtz attended the sale and bought the property for $2450 for Mrs. Lewis. Her money was paid to the master and the master issued

43535

ELIZABETH MARGUERITE LEWIS,
Appellee,

v.

SOPHIE J. BRENNAN, et al.,

PAUL A. VERNHOLTZ,
Appellant.

[illegible]

February [illegible], 19[illegible], [illegible] her complaint in chancery [illegible] Henry A. Burnam, as master in chancery of [illegible] Cook county, to cancel the [illegible] issued in [illegible] pleadings were settled, [illegible] where it is still pending.

March 17, 19[illegible], [illegible] to be made a party plaintiff. [illegible] Mrs. Lewis answered the petition and [illegible] referred to master [illegible] report, recommended that [illegible] petition [illegible] the cause proceed before master [illegible] in accordance with the master's recommendation [illegible] appeals.

The record discloses that Mr. Vernholtz is a lawyer practicing in Chicago since 1911; that Mrs. Lewis's husband, [illegible] Franklin Lewis, is a lawyer, but at the time in question was not in active practice. That on September 17, 19[illegible], improved real estate located at 3453-61 Dorchester avenue, Chicago, was sold at foreclosure sale by Master Burnam; that Vernholtz attended the sale and bought the property for $2450 for Mrs. Lewis. Her money was paid to the master and the master issued

his certificate to her. Within 12 months thereafter, viz., September 12, 1941, defendant in the instant case, Sophie J. Blumenthal, deposited $2,594.96 with Master Burman to redeem from the foreclosure sale, being the $2,450 plus interest. October 7, 1941, Mrs. Lewis assigned her master's certificate to Warnholtz, he paying her by check $3,795, being the $2,450 and apparently in settlement of other matters between them. At the same time Mrs. Lewis and her husband executed another document assigning all their present interest in the master's certificate to Warnholtz. Twenty days thereafter, Mrs. Lewis and Warnholtz entered into a written contract, the meaning of which is the principal matter in controversy in this case. That contract recites that Warnholtz is the assignee and owner of the master's certificate issued to Mrs. Lewis for $2,450 and subsequently assigned by her to Warnholtz; that the parties have been mutually interested in acquiring the property mentioned in the certificate; that the redemption sought to be made by Sophie J. Blumenthal was believed by the parties to be of no legal effect and that they desired to contest its validity for the purpose of retaining the benefits which would result from obtaining title to the property. And it was agreed that Mrs. Lewis pay $2,450 to Warnholtz "at the time of the execution hereof," and to further pay to him one-half of the court costs, reporter's fees, witness fees and other charges, including costs in case of an appeal which might be incurred in any litigation growing out of any suit that would be brought to determine the validity of such redemption. It was also agreed that Mrs. Lewis would pay to Warnholtz the further sum of $3,000 in the event such litigation had been determined in favor of the holder of the master's certificate. And that Mrs. Lewis have 60 days after such final

adjudication to pay the $3,000.

That "Warnholtz agrees to institute legal proceedings for the purpose of contesting the validity of the redemption," and to pay the remaining one-half of the court costs, etc., which might be incurred in the litigation. And it was further provided that Warnholtz "agrees to pay all the attorney fees in connection with such litigation (it being expressly understood that Elizabeth Margaret Lewis is not to pay nor be charged with any attorney fees in connection with such litigation); and further agrees to convey or cause to be conveyed to Elizabeth Margaret Lewis, or to any person by her designated, title to the said property known as 5463-81 Dorchester Avenue, Chicago, as may be obtained by him,,or any one in his behalf, through adjudication as hereinbefore stated, *** upon payment to him *** of ($3,000.00) by the said Elizabeth Margaret Lewis, *** but in the event that the said litigation should not terminate in an adjudication in favor of the plaintiff holder of the said Master's Certificate of Sale, then said Paul A. F. Warnholtz hereby agrees to pay to Elizabeth Margaret Lewis ***($2450.00); and further, said Paul A. F. Warnholtz agrees to hold the said Master's Certificate of Sale as security for the payment of the *** ($2450.00), which is to be made in the event that the said redemption under said Master's Certificate of Sale should not be adjudicated in favor of the plaintiff holder thereof."

The contract further provides that Warnholtz may accept the instructions or any modifications of the contract of Milo Franklin Lewis and they shall have the same effect as if made by Mrs. Lewis.

October 28, 1941, the day after the execution of this contract, Mrs. Lewis made her check for $2,450 payable to Warnholtz and it was delivered two days later to him and went through the

adjudicated in to say [illegible]

that "[illegible]

for the purpose of [illegible]

and to say the [illegible]

which [illegible]

[illegible]

connection [illegible]

that [illegible]

with any [illegible]

and further [illegible]

[illegible]

title to the [illegible]

[illegible]

[illegible]

to [illegible]

[illegible]

terminate [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

be made in the [illegible]

[illegible]

of the [illegible]

The contract [illegible]

the instrument [illegible]

Franklin Levis and they shall have the [illegible]

by Mrs. Levis.

October 28, 1921, the day after the execution of the contract, Mrs. Levis made her check for $150 payable to [illegible] and it was delivered two days later to him and [illegible]

banks in the regular course and was paid. About three months thereafter, January 24, 1942, Warnholtz executed an assignment of the master's certificate to Mrs. Lewis in which it is stated that the certificate was issued by the master to Mrs. Lewis in the foreclosure sale and that it had been assigned by her on October 7, to Warnholtz. This was acknowledged by Warnholtz on February 5 before a notary public and on the same day, February 5, Mrs. Lewis reassigned her interest in the certificate to Warnholtz, which was acknowledged by her before a notary public on February 5, 1942. All this took place in Warnholtz's office. On the next day, February 6, 1942, the complaint in the suit brought by Mrs. Lewis against Blumenthal, to cancel the redemption from the master's sale, was filed. It was sworn to by Mrs. Lewis. Frederick J. Bertram appears as plaintiff's solicitor, having been employed by Warnholtz. He was an office associate of Mr. Warnholtz, and the evidence is undisputed that the complaint was prepared by the two attorneys, Bertram and Warnholtz.

In the early part of 1944, which was about 2 years after the filing of this suit, Warnholtz received an offer from Sophie L. Blumenthal, to settle the case for $5,000. Mrs. Lewis refused to accept the offer and shortly thereafter, Bertram and Warnholtz refused to go on with the case and plaintiff obtained Cloyes & Cavender as her attorneys. Shortly thereafter, on April 13, 1944, Warnholtz was given leave of court to file an amended complaint in the suit in which he was named as co-plaintiff, claiming to be the sole owner of the master's certificate, and Mrs. Lewis was ruled to answer. She filed her answer denying that he had any interest in the certificate and that matter was referred to Master Mannion. He found that by the assignment of the certificate by Warnholtz

to Mrs. Lewis, dated January 24, 1942, and acknowledged by him February 5, 1942, she became the absolute owner of the certificate; that she paid him $2,450 for the assignment October 30, 1941, ursuant to the terms of the contract of October 27, 1941. And furthermore, since Warnholtz and Bertram had prepared the complaint in which it was alleged that Mrs. Lewis was the owner of the certificate and which they had Mrs. Lewis swear was true, Warnholtz was precluded from now claiming that he owned the certificate and further that the reassignment of the certificate by Mrs. Lewis to Warnholtz on February 5, 1942, was without consideration and void. And the master recommended that Warnholtz be required to assign and turn over the certificate to Mrs. Lewis. The master also recommended that one-half of the master's fees, $159.75, be taxed against Mrs. Lewis and the other one-half against Warnholtz; and that in the event Mrs. Lewis "makes any settlement of said litigation before said case is prosecuted to a conclusion, then in that event the said plaintiff, Paul A. F. Warnholtz, should be compensated for the reasonable value of his services rendered herein."

The decree followed the master and Mrs. Lewis has assigned cross-errors on these two recommendations. The master and the decree found that Mrs. Lewis was the owner of the master's certificate of sale; that she had paid one-half of the court costs amounting to $175.

Warnholtz in his brief contends that the contract entered into on October 27, 1941, by Mrs. Lewis and himself, was a contract by which Mrs. Lewis "merely agreed to purchase from Warnholtz certain real estate at a certain price, consisting of a down payment of $2450.00, which she made, and a final payment of $3000.00, which was to be paid by her if and when Warnholtz conveyed, or cause to be conveyed, to her the title to the real estate." And that in addition, Mrs. Lewis agreed to pay one-half

to Mrs. Lewis, dated January 24, 1942, [illegible]
him February 3, 1942, she sent the [illegible]
certificates; that she sold lot [illegible]
October 22, 1941, [illegible]
October 27, 1941. [illegible]
her overpaid her [illegible]
Lewis for the [illegible]
Lewis never saw them, [illegible]
that he had the [illegible]
of the certificates [illegible]
1942, was [illegible]
ed that [illegible]
certificate [illegible]
one-half of the [illegible]
Lewis and [illegible]
everything, [illegible]
said over to [illegible]
made of [illegible]
for [illegible]

The [illegible]
owner-[illegible]
Deeds found [illegible]
floats of [illegible]
amounting to [illegible].

Tambolis in his [illegible]
into on October 22, 1941, by [illegible]
contract by which [illegible] he "newly agreed to [illegible]
Tambolis certain real estate at a certain price, namely [illegible]
a down payment of $2400.00, which she made, and a final payment
of $3000.00, which was to be paid by her if and when he had a
conveyed, or came to be conveyed, to her the title to the real
estate." And that in addition, Mrs. Lewis agreed to pay one-half

of certain court costs in the proceeding to cancel the certificate of redemption issued by the master to Blumenthal. This contention cannot be sustained. The contract, we think, would bear no such construction. Moreover, the record fails to show that Warnholtz claimed any such construction until the case was on hearing before the master. The contract recites that "Whereas the said parties hereto have heretofore been mutually interested in acquiring the said property under said certificate of sale;" that a redemption was sought to be made by a third party which Mrs. Lewis and Mr. Warnholtz believed was of no legal effect; "And further, whereas the parties hereto desired to contest the said redemption *** for the purpose of acquiring or retaining the benefits which would result from obtaining the right to the said property." These recitals, taken in connection with the pleadings, the contract and all the evidence in the record, lead to the conclusion that both parties were interested in obtaining the real estate, and that Mrs. Lewis was to pay Warnholtz $2,450 for the assignment by Warnholtz to her of the master's certificate which was the amount Warnholtz had paid to her for it on October 7, 1941. She paid this money two days afterward viz. October 30, but did not get an assignment of the certificate until February 5, 1942. The contract further provided that in case the redemption sought to be made by Blumenthal was set aside, then Mrs. Lewis was required to pay Warnholtz $3,000 more, and the property would be hers. In case that litigation was not successful, Warnholtz was to repay her the $2,450. And there was a further provision that "Warnholtz agrees to hold the said Master's Certificate of Sale as security for the payment of the said Two Thousand Four Hundred Fifty Dollars." Since this money was paid to Warnholtz two days after the date of the contract, under its terms, he was not entitled to retain the master's certificate as security. There is evidence to the effect

of certain court costs in the proceeding to foreclose the certificate of redemption issued by the warden to [illegible]. The contention cannot be maintained. [illegible] been in such construction. [illegible] that [illegible] plaintiff may [illegible] [illegible] defendants plaintiff's [illegible] interested in acquiring [illegible] of [illegible] property which [illegible] legal effect; and [illegible] to convert [illegible] or [illegible] the right to [illegible] connection [illegible] in the [illegible] interested in [illegible] [illegible] of the master's certificate [illegible] had made to her for it on [illegible] viz. October 30, [illegible] certificate [illegible] that in case the redemption [illegible] was not made, then [illegible] $3,000 more, and the property would [illegible] tion was not successful, [illegible] and there was a further provision that "[illegible] the said master's certificate of sale [illegible] of the said two thousand four hundred fifty dollars." [illegible] money was paid to [illegible] two days after the date of the contract, under its terms, he was not entitled to retain the master's certificate as security. There is evidence to the effect

that after the contract was made, October 27, 1941, and before the suit was brought some three months thereafter, there was considerable talk, principally between Mr. Warnholtz and Mr. Lewis about the filing of the suit. There is further evidence on the part of Warnholtz, that the reason the suit was brought in Mrs. Lewis's name was that it was thought advisable by himself and Mr . Lewis to have the case brought by a woman. This is denied by Lewis.

Counsel for plaintiff says that since Mrs. Lewis was successful in her contest with Warnholtz, she should not be held for one-half of the master's fees. We think this is the law. In reference to the other cross error complained of, counsel for Mrs. Lewis say "While it is true that the plaintiff should not be permitted to discharge the defendant simply to avoid the payment of attorney's fees due him, as provided in the contract, still she should not be held liable for future attorney's fees if a settlement should be arranged after months of litigation upon other terms and conditions." We think that if the case is settled on the same, or substantially the same terms claimed to have been reached by Warnholtz and Blumenthal, then Mrs. Lewis should be required to pay Warnholtz a reasonable attorney fee for such service but should not be required to pay any such attorney's fee in case the settlement agreement was not substantially carried out.

The decree of the Circuit court of Cook county is affirmed in all things except as to the two matters mentioned in the cross errors and as to such two, the decree is reversed and the matter remanded to the Circuit court for further proceedings in accordance with the views herein expressed.

DECREE AFFIRMED IN PART, REVERSED AND
REMANDED IN PART WITH DIRECTIONS.

Matchett, P. J., concurs.

Niemeyer, J., dissents.

2.

that after the conference [illegible], [illegible] the suit was brought [illegible] considerable talk, [illegible] Lucia about the filing of the [illegible] on the ground of laches; [illegible] in [illegible] and [illegible] counsel [illegible].

[illegible] suggest [illegible] Warnhoft [illegible] held that [illegible] law. [illegible] court of [illegible] would the [illegible] continue, [illegible] attorney's fees [illegible] of litigation [illegible] in the case is [illegible] terms of [illegible] than [illegible] attorney fee for [illegible] for our [illegible] are not [illegible].

The decree of the [illegible] in all a large [illegible] errors and as to [illegible] remanded to the [illegible] court for further [illegible] in accordance with the [illegible] opinion.

[illegible]
[illegible]

Matchett, P. J., concurs.

Nieman, J., dissents.

43547



ROBERT C. RANSOM,
Appellant,

v.

FRANK KOSTA and JOSEPH KOSTA,
Doing business as Kosta Brothers,
Appellees.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 7, 1945, plaintiff brought suit before a justice of the peace in Oak Park, against defendants. The transcript of the justice discloses that the summons was served and on April 14, 1945, the case was tried before the justice. From the evidence the justice found in favor of plaintiff for $236.85. Judgment was entered on the finding and defendants appealed to the County court of Cook county. June 27, 1945, there was a trial without a jury in the County court, and after hearing the evidence and argument of counsel, judgment was entered in favor of defendants and against plaintiff for costs and plaintiff appeals.

On motion of defendants the report of the proceedings of the trial was heretofore stricken from the record. The argument made by plaintiff in his brief is based on the evidence, but since the report of the proceedings of the court was stricken, the evidence is not before us. In these circumstances the judgment of the County court of Cook county must be affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and Niemeyer, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1945

Term No. 4508 Agenda No. 2

| | | |
|---|---|---|
| JAMES A. BLUNK, Plaintiff-Appellee, vs. ROSE M. BLUNK, Defendant-Appellant. | ) | Appeal from the Circuit Court of Madison County |



CULBERTSON, J.

This is an appeal by Appellant, ROSE M. BLUNK (hereinafter called defendant) from a decree of the Circuit Court of Madison County, awarding her husband, the Appellee, JAMES A. BLUNK (hereinafter called plaintiff), a divorce on the grounds of habitual drunkenness, ordering him to pay $1,000.00 gross alimony, and denying the defendant appellant's cross-complaint for separate maintenance. Defendant has appealed only from that portion of the decree awarding a divorce on the grounds of drunkenness and allowing gross alimony. No appeal has been prosecuted with respect to that portion of the decree finding against defendant Appellant upon her cross-complaint for separate maintenance. Plaintiff appellee, however, has filed a cross-appeal from that portion of the decree awarding defendant $1,000.00 gross alimony.

Plaintiff filed a suit for divorce against his wife, Rose M. Blunk, charging her with excessive use of intoxicating liquors, and with habitual drunkenness for a period of more than two years. He charged that she went on frequent sprees and was unable to pursue her duties as a housewife, that she became abusive towards him both by the use of vile and opprobrious language, and by physical violence.

Defendant, by her answer, joined issue upon the question of drunkenness charged in the complaint, and filed her cross-complaint for separate maintenance, charging plaintiff with cruelty. Issue was joined upon this latter charge by the plaintiff herein. When this matter came on for hearing before the Chancellor some hineteen witnesses were heard, the plaintiff calling eleven and the defendant eight. The plaintiff testified that he was sixty-four years of age, that he remarried the defendant in 1936, and that he owned and operated a tavern in the City of Alton. Plaintiff and the defendant herein, resided upstairs over the tavern until sometime in October, 1944, when he left home because, he contends, the defendant herein, for six or seven years, had been in the habit of getting drunk two or three times a week, coming into the tavern and fussing with him, the help, and the customers.

Henry Loft, a bartender, formerly in the employ of the plaintiff, testified that he saw the defendant intoxicated once or twice a week. When, or for what period of time this was, does not appear clear from the evidence. Harry Lippincott, another former employee of the plaintiff, who had worked for the plaintiff three years prior to the time of the trial, testified that he had seen Mrs. Blunk intoxicated in the tavern. Mildred Hanson, another employee of plaintiff, five or six years prior to the time of the trial, testified that she worked for the plaintiff about four months and that during that time she saw the defendant intoxicated in the tavern about three or four times a week. It appears from the evidence that this witness was the "red-headed lady" the defendant and her husband had an argument about. Ed. McCann, a special policeman in the City of Alton, testified that at about 1:00 o'clock a.m., in the fall of 1944, he was invited into plaintiff's tavern by plaintiff, and that he observed the defendant drinking "pretty heavily" and that, "I believe she was intoxicated." The witness, Ernest Cason, claims to have also been present on this occasion and gave as his opinion that

defendant was "drinking a lot." Other witnesses testified to having seen defendant drink intoxicating liquors on several occasions.

The defendant herein testified, among other things that, she drank occasionally, but denied the charge of being an habitual drunkard, and she also denied being intoxicated on the occasions testified to by plaintiff and his witnesses. The witnesses for defendant testified, without exception, that they had not seen defendant intoxicated, and gave it as their opinion that she was not an habitual drunkard. It appears from the evidence herein that at the time of the trial the defendant was employed at the Western Cartridge Company, in the detonator department. She worked on three shifts and had been steadily at her employment. She testified that she worked in the tavern from March, 1936, two months before her remarriage to the plaintiff herein, until June of 1943, when she claims the plaintiff herein informed her he did not want her to work downstairs any longer. It appears that from 1936 to 1940 she was steadily employed at the tavern, working from five in the morning until three or four o'clock in the afternoon, when she would be relieved by the plaintiff herein. She admitted in her testimony that she took a drink now and then, but contends that she is not a drunkard.

Defendant's daughter, when called as a witness, testified to having seen her mother drink on occasions, but stated positively that her mother was not an habitual drunkard. Dorothy Curvey testified that she had known plaintiff and defendant for eight years, and that with her husband she stopped in the Blunk tavern two or three times a week, and that she had never seen the defendant drunk, nor had she ever heard anybody say anything bad about her or about her drinking. Clara Johnson testified that she was employed in the Tri-City store and that she knew plaintiff and defendant and that her husband would frequently go hunting with the plaintiff, and that she had known the defendant for about eight years, and had been in the tavern occasionally and that she had never seen the defendant drunk

or intoxicated and it was her opinion that the defendant was not an habitual drunkard. Mrs. Eugene Buckshot testified that she and her husband were acquainted with the Blunks, and that she had worked at the same place with Mrs. Blunk since November, 1943, and had seen her every day and that she had never known of the defendant being drunk. Howard Kinkade, assistant superintendent in the detonator department at Western Cartridge, testified that Mrs. Blunk had worked in his department about a year and a half and that her work required very careful workers and that he had been acquainted with Mrs. Blunk's work and that she had been very steady and that he had never seen her intoxicated. Eugene Buckshot, a former employee of the plaintiff, testified that he had known plaintiff for twenty-two years and the defendant since 1940, and that he had been employed by them in the tavern in '42 or '43, working on the evening shift, and in the time he was so employed he had never seen the defendant intoxicated, although on one occasion he had seen her take two drinks, one of which the witness bought for her and the other, the plaintiff. This witness testified that from '42 to the last of '43 he had seen the defendant every day about twice in the morning and usually saw her in the afternoon and he gave it as his opinion that she was not an habitual drunkard and that he had never seen her intoxicated. We believe that the foregoing fairly and accurately summarizes the evidence produced on the trial of this cause by both plaintiff and defendant.

The appellant herein urges and contends in this Court, and asks a reversal of the decree of the lower Court for two reasons, (First) She contends that she is not an habitual drunkard within the meaning of the law; and (Second) That the Trial Court clearly erred in failing to give proper consideration to the manifest weight of the evidence, which she claims was in her favor.

Habitual drunkenness for a space of two years, as a Statutory grounds for divorce, means an irresistible habit of getting

drunk, a fixed habit of drinking to excess, such frequent indulgence to excess as to show a formed habit and inability to control the appetite (SHORTHOSE vs. SHORTHOSE, 319 Ill. App. 355).

Bouvier defines an habitual drunkard as follows: "An habitual drunkard is a person given to inebriety or excessive use of intoxicating liquor, who has lost the power of will by frequent indulgence to control his appetite for it." This definition was approved in the case of RICHARDS vs. RICHARDS, 19 Ill. App. 465, and in LICHER vs. LICHER, 215 Ill. App. 441).

In the case of GARRETT vs. GARRETT, 252 Ill. 318, the Court says, "Habitual drunkenness means the irresistible habit of getting drunk, such frequent indulgence to excess as to form the habit, and inability to control it."

A careful consideration of the evidence in this case brings us to the inescapable conclusion that the defendant herein was not guilty of habitual drunkenness as that term is used in our Statute and understood in law. We, therefore, conclude that the Chancellor committed error in finding for the plaintiff.

The decree of the Circuit Court of Madison County is, therefore, hereby reversed and this cause remanded to said Court, with directions to dismiss the plaintiff's complaint for want of equity at plaintiff's costs.

REVERSED AND REMANDED,
WITH DIRECTIONS.

STONE, P.J. and
BARTLEY, J. concurring

ABSTRACT.

## RESERVE BOOK

Ill. Abstract

Vol. 327

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